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A TREATISE ON DEEDS.

BY

ROBERT F. NORTON,

OF LINCOLN'S INN, ONE OF HIS MAJESTY'S COUNSEL;

Second Edition

BY

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AND

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PREFACE.

The preparation of this Edition was originally entrusted to the late Dr. R. J. A. Morrison, to whom is due the credit of having collected most of the materials upon which it is based. It became necessary for him to have assistance in the completion of his work and he asked me to help him. My friend and I worked together, and only a few days before his death revised the first six chapters; the responsibility for the form that this revision finally took is mainly his, as would necessarily be the case in view of his greater learning and legal reputation. Since his death it has been my privilege to continue the work of revision and complete the Edition, and for the latter part of the book, to the extent of its difference from the first Edition, I take sole responsibility.

In regard to this latter part I have from time to time availed myself of the excellent notes left by my friend.

In so far as it is permissible to dedicate this Edition to anyone I do so in memory of a great gentleman who throughout his life upheld the best traditions of the Chancery Bar.

It may be objected that a great part of the book as it stands is obsolete. No one who has been trained in the perusal and deduction of title will, I think, find this criticism a sound one. For many years a knowledge and application of the principles so succinctly

enunciated by the original learned author, Mr. Norton, will be essential to all students and practitioners of law.

In some of the chapters I have tentatively suggested the possible effect of the old forms of limitation if used in deeds in the near or distant future. Every careful draftsman will hesitate before using "obsolete" expressions. But the Courts are seldom called upon to interpret deeds framed by careful draftsmen, and my suggestions (they are no more) will, I hope, meet with lenient criticism from that large body of men of riper years and sounder discretion than myself who may be called upon to read this book.

By the expression "new law" throughout the Edition a reference is intended to one or more of what are popularly known as the "new Property Acts." It does not necessarily mean that old established principles have been altered.

I have to thank my friend Mr. K. E. B. Kemp, of the Inner Temple, for valuable assistance in remodelling the Index and in the compilation of the Tables of Cases and Statutes respectively.

HUGH J. GOOLDEN.

LINCOLN'S INN,

May, 1928.

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ADDENDA ET CORRIGENDA.

ADDENDA.

Page 24. After "*Re Parrott*" *add* :—"*Ex p. Cullen.*"

Page 45 n. After "*Hong Kong and Shanghai Banking Corporation* v. *Lo Lee Shi*" *add* :—"[1928] A. C. 181."

Page 56. Last line. After "*Scrope* v. *Offley*" *add* :—"Distinguished, *Nottidge* v. *Dering*, [1910] 1 Ch. 297; 79 L. J. Ch. 439."

Page 88 n. After "*Stott* v. *Shaw and Lee*" *add* :—"[1928] 2 K. B. 26."

Page 153. *Add* side-note to sixth line :—"Antecedent conduct admissible as evidence to construe deed."

Page 207. After L. 8 *add* :—"Dower has been abolished as regards deaths after 1925 by the A. E. A., 1925, but see saving clause 51 (2) of that Act."

Page 222. At end of line 29 *add* :—"*Re Holland*, [1902] 2 Ch. 360; 71 L. J. Ch. 518"; and at end of line 27 *add* the word "and" after the word "before."

Last line. *Add* after "27 Eliz. (1585) c. 4" :—"re-enacted by section 173, Law of Property Act, 1925."

Page 280, l. 1. After "Law of Property Act, 1922," *add* :—"The unrepealed portion of this Act did not take effect until January 1, 1926."

Page 392, l. 17. After the words in brackets "this rule" *add* the words "*qua* rule."

Page 548. After "*Cole* v. *Kelly*" *add* :—"See also *Rye* v. *Purcell*, [1926] 1 K. B. 446; 95 L. J. K. B. 380."

Page 556. After "*Public Works Commissioner* v. *Hills*" *add* :—"See also *English Hop Growers, Ltd.* v. *Dering*, [1928] 2 K. B. 174

Page 574, 632. After "*Palmer* v. *Mallet*" *add* :—"Distinguished in *Way* v. *Bishop*, [1928] W. N. 145."

Page 620. Sidenote "Dower"—see addenda to p. 207 (*supra*).

Page 629. After the dictum of Lord Parker of Waddington in *Morris, Ltd.* v. *Saxelby* *add* :—"'It is now well established, that the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties, with more favour than they will regard contracts between master and servant in unequal positions of bargaining.'—*Per* Scrutton, J., *English Hop Growers, Ltd.* v. *Dering*, *supra*, at p. 180."

CORRIGENDA.

Page 7. *For* "*Bateman* v. *Mayor of Ashton-under-Lyme*" *read* "*Bateman* v. *Mayor of Ashton-under-Lyne.*"

Pages 7, 22. *For* "*Elliot* v. *Davies*" *read* "*Elliot* v. *Davis.*"

Page 19. *For* "*Pyne* v. *Campbell*" *read* "*Pym* v. *Campbell.*"

Page 29. *For* "*Salter* v. *Kidley*" *read* "*Salter* v. *Kidgley.*"

Page 60. *For* "*Cowlishow* v. *Hardy*" *read* "*Cowlishaw* v. *Hardy.*"

Page 88. *For* "*Edward* v. *Marcus*" *read* "*Edwards* v. *Marcus.*"

Page 168. *For* "section 205 (xxvii) L. P. Act, 1925," *read* "section 205, sub-section 1 (xxvii) L. P. Act, 1925."

Page 175. *For* "*Lancashire and Yorkshire Railway* v. *Swan*" *read* "*Lancashire and Yorkshire Railway* v. *Swann.*"

Page 178. *For* "*Watts* v. *Dix*" *read* "*Wats* v. *Dix.*"

Page 189. *For* "*Browns* v. *Burton*" *read* "*Browne* v. *Burton.*"

Page 228. *For* "section 205 (xxi) L. P. Act, 1925," *read* "section 205, sub-section 1 (xxi) L. P. Act, 1925."

Page 256. *For* "*Scratton* v. *Brown* (1825), 4 B. & L. 485" *read* "4 B. & C. 485."

Page 277. *For* "*Morris* v. *Dines*" *read* "*Morris* v. *Dimes.*"

Page 283. *For* "*Elliott* v. *North Eastern Ry. Co.*" *read* "*Elliot* v. *North Eastern Ry. Co.*"

Page 284. *For* "*North Eastern Ry. Co.* v. *Elliott*" *read* "*North Eastern Ry. Co.* v. *Elliot.*"

Page 293. *For* "*James* v. *Pritchard*" *read* "*Jones* v. *Pritchard.*"

Page 328. *For* "*Dilbrow* v. *Bone*" *read* "*Dilrow* v. *Bone.*"

Page 331. *For* "*Willon* v. *Berkeley*" *read* "*Willion* v. *Berkeley.*"

Page 356. *For* "*Wills* v. *Palmers*" *read* "*Wills* v. *Palmer.*"

Page 416, l. 22. *Delete* the words "in a conveyance."

Page 424. *For* "*Swift* v. *Eyres*" *read* "*Swyft* v. *Eyres.*"

Page 425. *For* "*Rivington* v. *Browne*" *read* "*Redington* v. *Browne.*"

Page 567. *For* "*Hankinson* v. *Sandilands*" *read* "*Haukinson* v. *Sandilands.*"

Page 569. *For* "*Smith* v. *Pockington*" *read* "*Smith* v. *Pocklington.*"

Page 574. *For* "*Palmer* v. *Mallett*" *read* "*Palmer* v. *Mallet.*"

A TREATISE ON DEEDS.

CHAPTER I.

THE FORM AND EXECUTION OF DEEDS.

efinition of a Deed: Signing: Sealing: Delivery: Delivery by Corporation: Escrows: Disclaimer: Acceptance: Attestation: Indentures and Deeds Poll: Deeds "inter partes": Counterparts.

To give a satisfactory definition of a deed is very difficult, as e definition must comprise the technicalities necessary for a deed, d yet exclude those documents which, though fulfilling the chnical requirements, are not deeds.

Incomplete definitions of deeds.

Lord Coke says: "'*A Deed*' *factum*. This word (deed) in e understanding of the Common Law is an instrument written parchment or paper, whereunto ten things are necessarily cident, viz.: First, writing. Secondly, in parchment or paper. hirdly, a person able to contract. Fourthly, by a sufficient me. Fifthly, a person able to be contracted with. Sixthly, by sufficient name. Seventhly, a thing to be contracted for. ghthly, apt words required by law. Ninthly, sealing. And enthly, delivery." Co. Litt. 35 b. And again, "*Factum, Anglicè*, deed, and signifieth in the Common Law an instrument nsisting of three things, viz., writing, sealing, and delivery, mprehending a bargaine or contract between party and party, an or woman. It is called of the civilians *literarum obligatio*": . Litt. 171 b.

Sheppard says: "A deed is a writing or instrument, (*read* a ntract,) written on paper, (vellum,) or parchment, sealed and livered, to prove and testify the agreement of the parties, whose ed it is, to the things contained in the deed": Shep. Touch. 50. he words in parentheses were added by Preston.)

These definitions are obviously incomplete, for they do not clude a grant.

Too extensive definitions.

"There are but three things of the essence and substance a deed, that is to say, writing in paper or parchment, sealin and delivery": *Goddard's Case* (1584), 2 Rep. 4 b at p. 5 a *S. C. sub nom. Denton and Goddard's Case*, 3 Leon. 100.

Termes de la Ley, *s.v.*, "Fait," has "So thus you see th writing and sealing without deliverie is nothing to purpose, th sealing and deliverie where there is no writing work nothing, n writing and deliverie without sealing also make no deed, a therefore they ought all jointly to concur to make a perfect dee as is before said."

Somewhat similar definitions are given in Comyns' Diges Fait, A. 1; Cruise's Digest, tit. xxxii, c. 1, s. 16; Tomlin's La Dictionary, *s.v.* "Deed"; Wharton's Law Lexicon, *s.v.* "Deed" Blackstone, Com. Bk. II, c. 20 (8th ed. vol. 2, p. 295); Stephen Commentaries (16th ed.), Bk. II, Pt. I, c. 18, p. 380.

These definitions are obviously too large; they include eve writing sealed and delivered, many of which are not deeds.

"It was argued that it did not follow, from the instrume being under seal, that it was a deed: for warrants of justice subpœnas, and awards, are under seal, and are not deeds": *p* Parke, B., *Hibblewhite* v. *McMorine* (1840), 6 M. & W. 200, p. 214; 9 L. J. Ex. 217; 55 R. R. 578.

Other definitions.

"Many documents under seal are not deeds; for instance, award, though sealed. Again, a will is often under seal. So is certificate of magistrates, a certificate of admission to the Colle of Physicians, or to other learned bodies. So is a share certificat Yet it can hardly be said that all these are deeds. The probate a will is very similar; it is given under the seal, formerly of t ordinary, now of the Court of Probate. It is a certificate of t will having been proved and administration granted; but I nev heard it suggested that that is a deed": *per* Bovill, C.J., *R.* *Morton* (1873), L. R. 2 C. C. R. 22, at p. 27; 42 L. J. M. C. 58

In Spelman's Glossary, title *Factum*, a deed is defined "*Scriptum solenne quo firmatur donum, concessio, pactu contractus et hujus modi*"; and Blackburn, J., in *R.* v. *Mort* (*supra*), says: "The definition of a deed cited from Spelman see to me the best."

"In some of the definitions given a deed is described as bei something of the nature of a contract. But the term is clea not confined to contracts. A charter of feoffment, for instance, a deed; so is a gift or grant, power of attorney, a release, o disclaimer. I would go further, and say that any instrum delivered as a deed, and which either itself passes an interest property, or is in affirmance or confirmation of something where an interest or property passes, is a deed. . . . I by no means

ıt I have enumerated all the possible kinds of deeds; there may others" : *per* Bovill, C.J., *R.* v. *Morton* (*supra*).

The following seems to be a correct definition :—

Definition of a deed.

A deed is a writing (i) on paper, vellum or parchment, (ii) sealed and (iii) delivered, whereby an interest, right, or property passes, or an obligation binding on some person is created, or which is in affirmance of some act whereby an interest, right, or property has passed.

New Law. L. P. Act, 1925, requires signature or mark as well.

Where a deed is executed after the commencement of the Law Property Act, 1925, the individual executing it must either sign place his mark upon the same, and sealing alone shall not be eemed sufficient (section 73).

Where grantee disclaims.

It is unnecessary to extend the above definition so as to mprise documents of the nature aforesaid, whereby an interest, ght or property would, but for the disclaimer of the grantee, have ssed, as the better opinion seems to be that in cases of disclaimer e property vests in the grantee until disclaimer : *Mallott* v. *ilson*, [1903] 2 Ch. 494; 72 L. J. Ch. 664.

Documents held deeds.

The following document has been held to be a deed : a power of torney—*R.* v. *Lyon* (1813), R. & R. C. C. 255; *R.* v. *Fauntleroy* 824), 2 Bing. 413; and the following documents have been held ɔt to be deeds, though written, sealed, and handed over by the aker, even if not delivered in the technical sense : An award—*od* v. *Herbert* (1655), Styl. 459; *Brown* v. *Vawser* (1804), 4 East, 4; a licence to use a patented article—*Chanter* v. *Johnson* (1845), M. & W. 408; 14 L. J. Ex. 289; 69 R. R. 712; a certificate the grant of holy orders, or "letters of orders"—*R.* v. *Morton upra*).

Paper necessary.

A deed must be written on paper, vellum, or parchment, "for an agreement be written on a piece of wood, linen, the bark of tree, a stone, or the like, and this be sealed and delivered, this no good deed" : Shep. Touch. 54.

Tally insufficient.

"If a man make a tally, and make a bond thereupon, and seal d deliver it as his deed, yet it shall not bind him, but he may ead against the same, that he owed him nothing, or wage his w. For an obligation ought to be made in writing in parchment paper, and not written upon any piece of wood, as a tally is" : tzherbert, Nat. Brev. 122 I (9th ed., p. 122); Y. B. 25 Edw. 3 351), 83, pl. 9; 44 Edw. 3 (1370), 21, pl. 23; and 12 Hen. 4 410), 23, pl. 3.

Wood or linen insufficient.

"A deed cannot be written upon wood, leather, cloath, or th like, but onely upon parchment or paper, for the writing upo them can least be vitiated, altered, or corrupted" : Co. Litt. 35 b

"And here it is to be understood that it (a deed indented) ough to be in parchment or in paper. For if a writing be made upon, peece of wood, or upon a peece of linen, or in the barke of a tree, o on a stone or the like, &c., and the same be sealed or delivered, y it is no deed, for a deed must be written either in parchment o paper, as before is said, for the writing upon these is least subje to alteration or corruption" : Co. Litt. 229 a. A similar passage to be found in Blackstone, Com. Bk. II, c. 20 (8th ed., p. 297).

Print.

The writing may be in any language and in any hand : She Touch. 54; and may be in print : 2 Bl. Com. Bk. II, c. 20 (8th ed p. 297); may be written in the third or first person : Littleto ss. 371, 373; and may be in a book : *Fox* v. *Wright* (1597), Cr Eliz. 613.

New Law. L. P. Act, 1925.

For what purposes a deed or writing is required by the La of Property Act, 1925, see *post*, pp. 30, 31.

When reading over necessary.

If the party to seal a deed be blind or illiterate and desire t have it read (or its contents declared), it must be read (or th contents declared), but if he do not desire to have it read or i contents declared, or if the party to seal a deed can read it an does not, then it is good though it is contrary to his mind. An if it be read falsely, or its contents falsely declared, and the part seal and deliver it, it is not his deed : Shep. Touch. 56. *Willis* v *Barron*, [1902] A. C. 271; 71 L. J. Ch. 609 (deed executed b widow on representation by her solicitor-trustee that it was t correct a "mistake" in a settlement).

When deed is void.

"Now the rule of law is that if a person who seals and delive a deed is misled by the misstatements or misrepresentations of th persons procuring the execution of the deeds, so that he does n know what is the instrument to which he puts his hand, the deed not his deed at all, because he was neither minded nor intended t sign a document of that character or class, as, for instance, release while intending to execute a lease. Such a deed is voi But I cannot come to that conclusion here. The defendants trust Jackson both as their brother and solicitor, and cannot be said have been guilty of negligence in so doing. On the evidence it clear that nothing was said to mislead them as to the nature of th instrument they were executing. It is doubtful how far they unde stood the nature of the deeds, but it is in my opinion clear up the evidence that they knew that the deeds dealt in some way wi their houses. This contention therefore fails." *Per* Cotton, L.J *Nat. Prov. Bank* v. *Jackson* (1886), 33 Ch. D. 1, at p. 10; follow in *Howatson* v. *Webb*, [1907] 1 Ch. 537; affirmed on appe

08] 1 Ch. 1; 77 L. J. Ch. 32. See also, *Edwards* v. *Brown* 31), 1 Cr. & J. 307, 312; 9 L. J. (o.s.) Ex. 84; *Onward Building iety* v. *Smithson*, [1893] 1 Ch. 1; 62 L. J. Ch. 138.

The authorities in support of the proposition are : Shep. Touch. and 56; Bl. Com. Bk. II, c. 20 (8th ed., pl. 304); Com. Dig. it, B. 2; *Manser's Case* (1583), 2 Rep. 3 a; Moore, 182, pl. 326; *oroughgood's Case* (1583), 2 Rep. 9 a; 1 Anderson, 129; *S. C. sub m. Thoroughgood* v. *Turner*, Moore, 148; *Shulter's Case* (1611), Rep. 90; *R.* v. *Inhabitants of Longnor* (1833), 4 B. & Ad. 647; L. J. M. C. 62; 1 N. & M. 576; *Foster* v. *Mackinnon* (1869), R. 4 C. P. 704, at p. 711; 38 L. J. C. P. 310; *Hunter* v. *alters* (1871), L. R. 7 Ch. 75; 41 L. J. Ch. 175; *Bagot* v. *apman*, [1907] 2 Ch. 222; 76 L. J. Ch. 523; *Roe* v. *Naylor* 918), 87 L. J. K. B., at p. 964; but unless actual misstatement the character of the deed is made the deed is only voidable : *nt. Prov. Bank* v. *Jackson* (*supra*); *Lloyds Bank, Ltd.* v. *ullock*, [1896] 2 Ch., at p. 196; 65 L. J. Ch. 680; *King* v. *Smith*, 900] 2 Ch. 425; 69 L. J. Ch. 598; see also, *Carlisle and Cumber-nd Banking Co.* v. *Bragg*, [1911] 1 K. B. 489; 80 L. J. K. B. 2.

When only voidable.

If three obligations are written on one piece of parchment and e only is read to an illiterate person who executes the deed, is only bound by such obligation : *Pigot's Case* (1614), 11 Rep. b, at p. 27 b, and the severability may extend to different parts the same deed so as, for instance, to avoid a covenant for yment in a mortgage deed while leaving the charge upon the operty valid, *per* Swinfen Eady, J., in *Bagot* v. *Chapman upra*); but his observations upon severability in that case were garded as *obiter* and not fully accepted by the Court of Appeal *Howatson* v. *Webb* (*supra*).

But it is questionable whether the proposition would apply at e present day to the case of a man not blind or illiterate, for if a man, *i.e.*, a solicitor knows that the deed is one purporting deal with his property, it will not be sufficient for him, in order support a plea of *non est factum*, to show that a misrepresenta-on was made to him as to the contents of the deed," *per* arrington, J., in *Howatson* v. *Webb*, [1907] 1 Ch. 537, at . 547—548, which statement of the law was adopted by the urt of Appeal, [1908] 1 Ch. 1; 77 L. J. Ch. 32, when Farwell, J., with reference to *Hunter* v. *Walters* (*supra*), said : " I think yself that the question suggested, but not decided, by Mellish, J., in that case will some day have to be determined, viz., ether the old cases on misrepresentation as to the contents of deed were not based upon the illiterate character of the person whom the deed was read over, and on the fact that an illiterate

man was treated as being in the same position as a blind man : s *Thoroughgood's Case*" (*supra*) "and Sheppard's Touchston p. 56; and whether at the present time an educated person, wh is not blind, is not estopped from availing himself of the plea *non est factum* against a person who innocently acts upon the fait of the deed being valid"; to which observations Cozens-Hardy M.R., assented. In *Howatson* v. *Webb* (*supra*) the defendant, solicitor, had executed a mortgage deed, containing his person covenant for payment of the mortgage debt and interest, on th representation of his principal, also a solicitor, that the deed wa merely a transfer of property held by the defendant as his nomine The Court of Appeal, affirming Warrington, J., held that the ple of *non est factum* failed, and that the defendant was liable on th covenant at the suit of the transferee of the mortgage.

Deed of lunatic.

The deed of a lunatic was not, according to the older case voidable by the lunatic (Litt. s. 405; Co. Litt. 247 b; *Beverley Case* (1604), 4 Rep. 123 b; *Stroud* v. *Marshall*, Cro. Eliz. 398, ove ruling Fitzherbert F. N. B. 202 d), because no man was allowe to stultify himself; but this rule seems to have been relaxed i *Yates* v. *Boen* (1738), 2 Stark. 1104, where the defendant, sue in debt upon articles, pleaded *non est factum*, and was allowed t give evidence of lunacy, which resulted in a non-suit.

But the deed of a lunatic is voidable by his committee or b his heir, Litt. 405 b; Co. Litt. 247 b; *Thompson* v. *Leach* (1697 1 Ld. Raym. 313 (a deed of surrender), and *Elliot* v. *Ince* (1857 7 De G. M. & G. 475; 26 L. J. Ch. 281; 109 R. R. 208 (a pow of attorney); and it would probably be voidable by the lunat (if not void) if the other party knew of the lunacy; *Browne* v *Jodrell* (1827), 1 Moo. & Malk. 105; *Baxter* v. *Earl of Portsmout* (1826), 2 C. & P. 178; (1826), 5 B. & C. 170; *Dane* v. *Viscounte Kirkwall* (1838), 8 C. & P. 679; 56 R. R. 860; *Molton* v. *Camrou* (1848), 2 Exch. 487; (1849), 4 Exch. 17; 18 L. J. Ex. 68; 76 R. R 669; *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599; 61 L. Q. B. 449; *York Glass Co., Ltd.* v. *Jubb* (1925), 42 T. L. R. (all cases of contract).

The deed poll of a lunatic so found by inquisition, executed b her during a lucid interval and settling and disposing of h property, is absolutely void : *Re Walker*, [1905] 1 Ch. 160; 7 L. J. Ch. 84 (*a*); so also is an equitable charge given by a man respect of whose estate a receivership order has been made und section 116, sub-section 1 (d) of the Lunacy Act, 1890, and cons

(*a*) The will of the same lunatic, dated three months after this decision the Court of Appeal, was, however, subsequently admitted to probate on t ground that when it was made the lunatic was of full testamentary capacit see *Re Walker* (1912), 28 T. L. R. 467.

ently such an attempted charge will not work a forfeiture of his otected life interest in the property: *Re Marshall*; *Marshall* v. *hateley*, [1920] 1 Ch. 284; 89 L. J. Ch. 204.

Power of attorney of lunatic.

A power of attorney to transfer shares given by a man of sound mind, not so found, is void: *Daily Telegraph Newspaper* *McLaughlin*, [1904] A. C. 776, at p. 779; 73 L. J. P. C. 95.

New Law.

As to dispositions conveying or creating a legal estate in the me and on behalf of a lunatic or defective, see Law of Property t, 1925, s. 22.

Corporation.

If the deed of a corporation created by Act of Parliament r particular purposes and with special powers is *ultra vires* the ed is void: see *South Yorkshire Ry.* v. *Great Northern Ry.* 853), 9 Ex. 55, at p. 85; 22 L. J. Ex. 305; 96 R. R. 550; and *iteman* v. *Mayor of Ashton-under-Lyme* (1858), 3 H. & N. 323, p. 335; 27 L. J. Ex. 458; 117 R. R. 708.

Signing unnecessary.

Signing is not necessary to make a deed valid as such at common w, nor, contrary to Blackstone's opinion, Com. Bk. II, c. 20 nd ed., p. 305), by the Statute of Frauds (29 Car. 2, c. 3). But whether the parties to the deed write in the end their names set to their marks, as it is commonly used, it matters not at all s I think) for that is not meant where it is said that every deed ight to have writing": Termes de la Ley, *s.v.* "Fait"; Preston Shep. Touch. 56; Shep. Touch. 60; 3 Prest. Abst. 61; *Cromwell* *Grunsden* (1697), 2 Salk. 462; 1 Ld. Raym. 335; Holt, 502; *C. sub nom. Cromwell* v. *Grimsdale*, Comb. 477; *Elliot* v. *avies* (1800), 2 Bos. & Pul. 338; 5 R. R. 616; *Wright* v. *Wakeford* 811), 17 Ves. 454, at p. 459; *Taunton* v. *Pepler* (1820), 6 Madd. 6; *Aveline* v. *Whisson* (1842), 4 Man. & Gr. 801; 12 L. J. C. P. ; 61 R. R. 662; *Cherry* v. *Heming* (1849), 4 Ex. 631; 19 L. J. x. 63; 80 R. R. 733; *Tupper* v. *Foulkes* (1861), 9 C. B. (N.S.) 7; see especially *per* Williams, J., at pp. 801 and 803; 30 L. J. P. 214; 127 R. R. 889.

When signing necessary.

But if a document be required to be under *hand* and seal, g., the execution of a power, then it is not well executed as an xecution of the power if it be sealed and delivered only without eing signed, though (apart from the Law of Property Act, 1925) would be a good deed. And if reliance has to be placed on the rovisions of section 159 of the Law of Property Act, 1925, lating to the execution of powers, signing may be necessary, nd, in the case of deeds exercising powers executed after the assing of the Act, will be necessary.

New Law.

In respect of deeds made after 1925 an individual who executes deed must sign his name or put his mark, and sealing alone will ot be sufficient: Law of Property Act, 1925, s. 73.

Sealing.

Sealing is essential to a deed. "The fourth thing required in

every well-made deed is that it be sealed; no writing without seal can be a deed": Shep. Touch. 56; Co. Litt. 6 a, 35 b, an 171 b; Termes de la Ley, *s.v.* "Fait"; Blackstone, Com. Bk. II c. 20 (8th ed., p. 305); Perk. s. 130; *Goddard's Case* (1584) 2 Rep. 4 b, at p. 5 a; *Hollingworth* v. *Ascue* (1592), Cro. Eliz. 355 *Southwel* v. *Brown* (1596), Cro. Eliz. 571; *Cabell* v. *Vaugha* (1670), 1 Wms. Saunders, 291 (see notes); 1 Vent. 34; 2 Keble 525, 528; 1 Sid. 420; *Putt* v. *Nosworthy* (1671), 1 Vent. 135 But a deed need not be sealed by the party, or with his seal, i he recognises the seal as his. Any seal will do, even a borrowe seal: Bracton, Lib. II, c. 16, s. 12, fo. 38; Britt. Lib. II, c. 8 s. 10, fo. 101; Fleta, Lib. III, c. 14, s. 13. "It is nothing t charge whether it be sealed with the seal of the grantor or not or by a stranger, or by the grantor": Perk. s. 130, and see s. 131 Shep. Touch. 57.

Not only may any seal be used, but so may "a stick or an such like thing which doth make a print": Shep. Touch. 57. I Termes de la Ley, *s.v.* "Fait," reference is made to a charte of Edward III of which the last two lines run in the Englis translation thus—

> "And in witness that it was sooth
> He bit the wax with his foretooth."

What is a sufficient seal.

Another instance of biting the wax is mentioned in the same place An impression made in ink with a wooden block is sufficient *R.* v. *Inhabitants of St. Paul, Covent Garden* (1845), 7 Q. B. 232 14 L. J. M. C. 109. This was an order of justices for removal o a pauper and not a deed, but one of the questions debated wa whether it was well sealed. "To constitute a sealing neither wa nor wafer, nor a piece of paper, nor even an impression i necessary": *per* Bovill, C.J.; see also *Ex p. Brown* (1911), 10 L. T. 649 (omission of seal on summons signed by magistrate) *Re Sandilands* (1871), L. R. 6 C. P. 411, at p. 413; *S. C. su nom. Re Mayer*, 40 L. J. C. P. 201; 19 W. R. 641; distinguishe in *Re Smith* (1892), 67 L. T. 64. "The sealing of a deed nee not be by means of a seal, it may be done with the end of a rule or anything else. Nor is it necessary that wax should be used" *per* Byles, J., *ibid.* But some act must be done "with th intention of sealing": *per* Montague Smith, J., *ibid.*; and se Sugden on Powers, c. 7, s. 4, para. 9 (8th ed., p. 232). "If th finger be pressed on the ribbon that may amount to a sealing" *per* Cotton, L.J., *Nat. Prov. Bank of England* v. *Jackson* (1886) 33 Ch. D. 1, at p. 11; 34 W. R. 597. The question whether deed was or was not sealed by a particular person is one of fac to be determined on the evidence given in each case: *ibid.*

One seal sufficient.

One piece of wax will serve for several executing parties, ovided they make distinct and several prints : Shep. Touch. 57; rk. s. 134; and one person may by proper authority seal on half of several executing parties if those parties treat the seal their seal : Shep. Touch. 57; Perk. ss. 130, 131; *Lovelace's se* (1632), W. Jo. 268; *Ball* v. *Dunsterville* (1791), 4 T. R. 313; R. R. 394; *Cooch* v. *Goodman* (1842), 2 Q. B. 580, at p. 598; L. J. Q. B. 225; but the person so sealing must have authority seal on behalf of the others, or those parties must treat the al as their seal : Shep. Touch. 57; *Harrison* v. *Jackson* (1797), T. R. 207; 4 R. R. 422; *Elliot* v. *Davis* (1800), 2 Bos. & P. 8; 5 R. R. 616; and a partner has no general authority to xecute a deed in the names of his co-partners : *Marchant* v. *orton, Down & Co.*, [1901] 2 K. B. 829; 70 L. J. K. B. 820; ut if he executes in the partnership name the execution is a good xecution by him personally : *Metcalfe* v. *Rycroft* (1817), 6 M. & . 75.

Partners.

The seal may be affixed to the document before it is actually ritten, it must be affixed before the document is delivered : see reston in Shep. Touch., p. 57; Finch, Law, Bk. II, c. 2, 108.

An instrument to which a seal has been affixed by mistake will e deemed not a deed, but a mere agreement : *Clements* v. *unhouse* (1803), 5 Esp. 83; Preston's Shep. Touch., p. 50.

Unsealed paper incorporated.

A paper not under seal may be incorporated in a deed : *outledge* v. *Burrell* (1789), 1 Hy. Bl. 255.

What is sufficient sealing.

In *Re Sandilands* (*supra*), a deed which had been sent to Ielbourne to be executed and acknowledged by a married woman nder a special commission, and returned with a certificate of ommissioners that it had been duly acknowledged, and an attestaon clause stating that the deed had been signed, sealed, and elivered, was held to have been in fact sealed though there were nly green ribbons, without any seal or impression thereon, ttached to the place where the seal should have been; but in *at. Prov. Bank of England* v. *Jackson* (*supra*), Cotton, L.J., commenting on that case, said the certificate (of the ommissioners), not the attestation clause, must have been relied n as evidence of due execution, and if not he could not agree ith the decision; and Lindley, L.J., said it was "a good-natured ecision in which I am not sure that I could have concurred."

What is insufficient sealing.

In *Nat. Prov. Bank of England* v. *Jackson* (*supra*), a voluntary onveyance which had only a piece of ribbon attached to the place here the seal should have been, and no seal nor impression hereon, and which had been retained by the grantor, and of hich the grantee was in ignorance, was held never to have been fact sealed, and to be invalid though the attestation clause

stated it was signed, sealed, and delivered, and the witnes admitted his signature as a witness, but could remember nothin about the execution; and in *Re Balkis Consolidated Co., Lt* (1888), 36 W. R. 392; 58 L. T. 300, a transfer of shares containe only a place for a seal but no impression, and though the attestatio clause stated the instrument to have been signed, sealed, an delivered, North, J., refused to presume that it had in fact bee sealed; but *semble* in any event the instrument was inoperative a having been executed without the name of a transferee. See also *Re Smith* (1892), 67 L. T. 64.

Companies and Societies; formalities relating to sealing of instruments.

In the case of deeds of companies incorporated under th Companies Acts, the formalities prescribed by the articles wit regard to the mode of execution must be observed; and deed of societies incorporated under the Building Societies Act, 1874 and under the Industrial and Provident Societies Act, 1893, mus be executed in accordance with the rules of the society. Th name of such company or society must be engraven on its sea and any officer of the company or society using any seal purportin to be the seal of the company or society whereon its name is no engraven is liable to a summary conviction and fine: Companie (Consolidation) Act, 1908, s. 63, sub-ss. 1 (b), 3; Industrial an Provident Societies Act, 1893, ss. 12, 21, 66; Building Societie Act, 1874, ss. 9, 16, sub-s. 10.

New Law.

As to the execution of deeds made after 1925 by or o behalf of corporations, see section 74 of the Law of Property Act 1925.

Delivery.

Delivery is essential to a deed: Co. Litt. 35 b, 171 b; Shep Touch. 50; *Goddard's Case* (1584), 2 Rep. 4 b; for "*traditio fac loqui chartam*": *Clayton's Case* (1584), 5 Rep. 1; 4 Cru. Dig p. 28, s. 79; Bl. Com. Bk. II, c. 20 (8th ed., p. 306). "Deliver is that act by which effect is given to the deed": Prest. Abst vol. 3, p. 63. "After a deed is written and sealed, if it be no delivered, all the rest is to no purpose": Termes de la Ley, *s.v* "Fait." "The operative part of the ceremony is the delivery" *per* Keating, J., *Tupper* v. *Foulkes* (1861), 9 C. B. (N.S.) 797, a p. 803; see also *per* Williams, J., *ibid.*, at p. 803; 30 L. J. C. P 214; 127 R. R. 889. "A deed has no operation until delivery" *per* Bayley, J., *Styles* v. *Wardle* (1825), 4 B. & C. 908, at p. 911 28 R. R. 111; Bl. Com. Bk. II, c. 20 (8th ed., p. 307). "Wher a contract is to be by deed, there must be delivery to perfect it . . . This is a positive absolute rule of the common law, whic nothing but an Act of Parliament can alter, and which in m judgment ought not to be frittered away": *per* Martin, B., *Xen* v. *Wickham* (1863), 14 C. B. (N.S.) 435, at p. 473; 33 L. J. C. P 13; 135 R. R. 757.

It follows that a deed can be altered before delivery : Brooke's ›r. tit. Faits, 327, pl. 61 (*b*). Alteration before delivery.

Lord Coke (Co. Litt. 7 a) remarks that in ancient charters of ›ffment there is no mention of the delivery of the deed, and ·acton (Lib. II, c. 16, s. 12, fo. 38), and Fleta (Lib. III, c. 14, 13), in discussing charters of feoffment, mention sealing, but y nothing of delivery; but a charter of feoffment was merely ·idence of a conveyance, and until the Statute of Frauds (29 ır. 2, c. 3) was not a necessary part of it, the estate passing by ·ery of seisin; 2 Sanders, Uses and Trusts, tit. Feoffment, p. 3 ›th ed.). Charters of feoffment.

The method of conveyance by feoffment and livery of seisin ıs been abolished by section 51 of the Law of Property Act, 1925. New Law.

A deed takes effect from delivery, and so if a deed and will ealing with the same subject-matter are made on the same day, ıe deed is effective, and not the will : *Cochin* v. *Heathcote* (1773), offt, 190.

As to the possible effect of a grant made by a father in con- deration of natural love and affection contained in a deed poll ithout livery, see *Rigden* v. *Vallier* (1751), 2 Ves. Sen. 252, t p. 255.

It is said in Grant on Corporations, p. 147, that the affixing of ıe common seal to the deed of a corporation is tantamount to a elivery; and a similar statement is contained in Cruise's Digest, ol. 4, tit. Deed, c. 2, s. 81. But there is no authority for such a roposition; indeed what authority there is on the point is the ther way, and the statement cannot be accepted as law. Grant ›ok the proposition from Comyns' Digest (Fait, A. 3), quoting also *non.* (1674), 1 Vent. 257; *Derby Canal Co.* v. *Wilmot* (1808), 9 ast, 360; 9 R. R. 577; and *Dean and Chapter of Fernes' Case* 1607), Davis, 44 b. Comyns gives as his authority 2 Roll. Abr. 3, l. 50 (where *Willis* v. *Jermin* and an extract from the *Case of he Dean and Chapter of Fernes* (both hereinafter mentioned) are ited), and Dav. 44, which is the reference to that extract. (The oint is also referred to in 2 Roll. Abr., p. 24, ll. 1 and 25.) The ditor of Comyns has added a further reference to *Willis* v. *Jermin* 1589), Cro. Eliz. 167, where the decision is directly the contrary f the proposition. Cruise gives no authority for the proposition, nd merely cites 9 East, 360, as a qualification of it. Sealing by corporation is not delivery.

Wood's Conveyancing, vol. 1, p. 194, quotes *Willis* v. *Jermin*, nd makes a similar statement, citing Rolle, *loc. cit.*, and Dav. 44 b, ut adds "*sed vide* Co. Litt. 36 a, note 5." That note cites *Iayward* v. *Fulcher* (1627), W. Jo. 166; Palmer, 491; and Dav. 4; *Willis* v. *Jermin*; and the case cited by Lord Hale at W. Jo.,

(*b*) As to alterations generally, see next chapter.

p. 170; Palmer, p. 504. In 1 Roll. Abr. 1, p. 830, it is stated tha a corporation out of possession cannot effectively seal a lease an execute a letter of attorney to deliver it on the land, but the might put their lease in writing and make a letter of attorne *to seal and deliver the lease as their deed*; but the learned edito states that the decision in *Willis* v. *Jermin* is to the contrary.

The cases discussed.

In *Willis* v. *Jermin* (1589), Cro. Eliz. 167; *S. C. sub nom. Willi and Jermine's Case*, 2 Leon. 97, a corporation who were not i possession sealed a lease and gave a letter of attorney to enter an make delivery of the deed upon the land. It was objected that th lease was not good, because the corporation let the land by puttin their seal to the deed, *which being a perfecting the deed of th corporation*, there can be no other delivery, and as they were ou of possession the lease was void, and the delivery after by th attorney, it having a former delivery, is void; *sed non allocatur*, fo there is no other means for a corporation to make a lease but this and Gawdy, J., said: "It is plain that it is not the lease or dee of the corporation until delivery, as of another person."

In the *Case of the Dean and Chapter of Fernes* (1608), Davis 42 b, one of the counsel arguing the case said (44 b): "Et le fai de un corporation ne besoigne delivery come le fait de un natura person mes le apposition del commone seale done perfection a ce solement," but gave no authority for the argument. (Th references to Lib. Ass. are to the rest of the paragraph.) The sam point arose in *Hayward* v. *Fulcher* (1627), W. Jo. 166, at p. 170 Palm. 491, at p. 504, where the Judges appear to have differed a to whether the lease was or was not good, and the reporters d not agree as to the Judges who held such different opinions. Th point arose again in *Good* v. *Ash* (1675), 3 Keb. 307; *S. C. Anon.* 1 Vent. 257. In the short report in Ventris it is stated that it wa "held to be a good lease, for though the putting the seal of corporation aggregate to the deed carries with it a delivery, ye the letter of attorney to deliver it upon the land shall suspend th operation of it while (? till) then"; while in the report in Kebl it is stated that "Twisden, J., doubted" the lease "was void being a perfect lease by sealing, and the delivery after insignificant but Hales, C.J., said that since he came to this Court it was rule that the later execution is good, and the first lease sealed is bu as an escrow when the letter of attorney is delivered at the sam time, so *Gorman* and *Willis*, 3 Cr. 167" (evidently a reference t *Willis* v. *Jermin* (1589), Cro. Eliz. 167).

Corporation can deliver escrow.

In *Derby Canal Co.* v. *Wilmot* it was held that a deed seale by a corporation was an escrow, for in order to give "the deed of a corporation "effect, the affixing of the seal must be don with intent to pass the estate, otherwise it operates no more than

ffment would do without livery of seisin" : *per* Lord Ellen-rough, C.J., *Derby Canal Co.* v. *Wilmot* (1808), 9 East, 360; R. R. 577.

It is true that in *Gartside* v. *Silkstone and Dodworth Coal and on Co.* (1882), 51 L. J. Ch. 828; 21 Ch. D. 762; Fry, J., says, p. 768 : "A deed executed by a company requires no delivery make it effectual. Therefore there could be nothing whatever in e nature of delivery as an escrow, and the deed was complete e moment that it received the seal of the company. I do not rget that the company retained the debentures after they were aled, as they were entitled to do until they received the money r them; nor do I mean for one moment to indicate that the benture-holders could have sued the company upon the debentures fore the actual delivery to them, or the actual payment of the oney by them"; but the latter part of the sentence implies that elivery was necessary to perfect the deed.

And in *Mowatt* v. *Castle Steel and Iron Works Co.* (1886), 4 Ch. D. 58, it was held that debentures sealed by a company ere not effective, and Cotton, L.J., said, at p. 62 : "The ebentures must be delivered before they can be binding on the ompany. The fact of their being dated and sealed does not show at they were delivered."

"The affixing of the seal is not enough; there must be a elivery of the deed also : *Derby Canal Co.* v. *Wilmot* (1808), East, 360. *Prima facie* putting the seal imports delivery; yet it be intended otherwise it is not so" : *per* Wills, J., *Mayor, tc., of Merchants of the Staple of England* v. *Governor & Co. f the Bank of England* (1887), 21 Q. B. D. 160, at p. 165; 7 L. J. Q. B. 418.

Delivery may be effected by words alone, or without words by ie acts or conduct of the party, from which it can be inferred at he intended to deliver the deed as an instrument binding on im : Co. Litt. 36 a and 49 b; Shep. Touch. 57; *Thoroughgood's ase* (1612), 9 Rep. 136 a. Delivery how effected.

"No particular technical form of words or acts is necessary to ender an instrument the deed of the party sealing it. The mere ffixing of the seal does not render it a deed; but as soon as there re acts or words sufficient to show that it is intended by the arty to be executed as his deed presently binding on him it is ufficient. . . . Any words or acts that sufficiently show that it as intended to be finally executed will do" : *per* Blackburn, J., *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, at p. 312; 36 . J. C. P. 313; 149 R. R. 467; *Macedo* v. *Stroud*, [1922] 2 A. C. 30, at p. 337; 91 L. J. P. C. 222.

"It is a question of intention and fact to be tried by the

jurors" : *per* Pigott, B., *ibid.*, at p. 309. "Anything to show that he treated the deed as his is enough" : *per* Williams, J. *Tupper* v. *Foulkes* (1861), 9 C. B. (N.S.) 797, at p. 809; 3 L. J. C. P. 214; 127 R. R. 889; *Re Seymour*, [1913] 1 Ch. 475; 82 L. J. Ch. 233.

Examples of delivery.

Thus it has been held a sufficient delivery—Where the deed was delivered to B to give to C, who refused to accept it : *Tate* v. *Bury* (1557), 1 And. 4; Dyer, 167 b (but see *Butler and Baker's Case* (1591), 3 Rep. 25 a, at p. 26 b; and *Whelpdale's Case* (1604), 5 Rep. 119). Where the obligor handed the obligation to the obligee with the words "This will serve" : *Parker* v. *Tenant* (1560), 2 Dy. 192 b, pl. 26. Where the deed was left behind and not countermanded : *Shelton's Case* (1581), Cro. Eliz. 7. Where a release was cast upon the table and the releasor said, "There this will serve" : *Hollingworth* v. *Ascue* (1593), Cro. Eliz. 355, 461, 494 and 544. Where the deed was given by a third party in the grantor's presence and he received the money : *Goodright* v. *Gregory* (1773), Lofft, 339. Where the grantor acknowledged the deed which had been signed in his name by his son as his deed : *Tupper* v. *Foulkes* (*supra*); *Re Seymour* (*supra*). Where there was conduct from which delivery was inferred : *R.* v. *Inhabitants of Longnor* (1833), 4 B. & Ad. 647; 2 L. J. M. C. 62; *Hall* v. *Bainbridge* (1848), 12 Q. B. 699; 17 L. J. Q. B. 317; *Keith* v. *Pratt* (1862), 10 W. R. 296; *Evans* v. *Grey* (1862), 9 L. R. Ir. 539.

What is not sufficient delivery.

But in *Stanton* v. *Chamberlain* (1587), Owen, 95; 1 Leon. 140; *S. C. sub nom. Chamberlain* v. *Stanton*, Cro. Eliz. 122, where the defendant caused a bond to be written, and signed and sealed it and then laid it upon the table, and the plaintiff, the defendant not being present, came and took it, there was held to be no delivery but "if the jury had found that the defendant had sealed the bond and cast it upon the table towards the plaintiff to the intent that the plaintiff should take it as his deed, who took the bond and went away, that had been a good delivery; or that the plaintiff, after the sealing and casting on the table, had taken it by the commandment or consent of the defendant."

And payment of interest by a married woman after her husband's death has been held not sufficient delivery by her of a mortgage made by her and her husband : *Drybutter* v. *Bartholomew* (1723), 2 P. Wms. 127; 2 Eq. Ca. Abr. 132, pl. 4.

Whether re-delivery can be presumed.

In *Goodright* d. *Carter* v. *Straphan* (1774), 1 Cowp. 201, a married woman and her husband had by deed demised land of the wife's by way of mortgage; such deed was of course ineffectual to bind the wife, but after her husband's death she had signed (i) an account allowing interest on the mortgage; (ii) a writing surrendering possession to the executors of the mortgagee; and

ii) a direction to the tenant to attorn tenant to the executors of ıe mortgagee. *Held*, that these facts were a confirmation of the ıortgage upon the ground of their being equivalent to a redelivery : the deed, which had remained in the hands of the mortgagee. ut on this case Bowen, L.J., said in *Powell* v. *London and rovincial Bank*, 62 L. J. Ch. 795; [1893] 2 Ch. 555, at p. 563 : I am by no means satisfied that in that case there was anything ıore than an estoppel which arose between the parties"; and the ourt of Appeal, in *Powell* v. *London and Provincial Bank*, *ubi up.* affirming Wright, J., [1893] 1 Ch. 610, *held* that redelivery f a transfer of shares signed in blank and given as security for a ebt to the transferees and afterwards filled up by them with their ame could not be presumed, though the transferees gave notice o the transferor of their intention to register the transfer, and redited him in account with the dividends received by them after uch registration, and gave him notice of such credits, and he uthorised them to sell the stock upon certain conditions. The uestion of presuming redelivery is also discussed in *Hudson* v. *Revett* (1829), 5 Bing. 368; 7 L. J. (o.s.) C. P. 145; 30 R. R. 649.

Adoption amounting to redelivery by the principal of a deed, xecuted by attorney under a power not sufficiently wide to uthorise its execution, was inferred in *Re Seymour* (*supra*).

Delivery by corporation.

A corporation must deliver its deeds at a corporate meeting or by attorney.

"If delivery" (*sc.* of a deed by a corporation) "be made upon different occasion" (*i.e.*, an occasion different from that on which t is sealed) "and not at a corporate meeting, it must be done by ome person acting under a power of attorney from the corporation : *Anon.* (1675), 1 Vent. 257. It seems to be very old law that except under a power of attorney, which of course must be subject o the same rules as any other deed) the delivery must be made t a duly constituted meeting of the corporation : Brooke's Abridgment, tit. Corporations, pl. 72, citing the Year Book, 9 Edw. 4 1469), p. 39, a passage which entirely bears out the Abridgment" : *per* Wills, J., *Mayor, etc., of Staple* v. *Bank of England* (1887), 1 Q. B. D. 160, at p. 166; 57 L. J. Q. B. 418. But delivery as n escrow at the corporate meeting is sufficient, and on performance of the condition no further delivery is necessary.

Trading corporations.

As a matter of practice, the directors of joint stock and other rading companies are in the habit of executing deeds, on behalf of uch companies, otherwise than at a meeting of the company (*i.e.*, f the shareholders), and their authority for doing so would appear o be the statutory force given to the articles of association of joint tock companies by the provisions of the Companies (Consolidation)

Act, 1908, or the fact that business can only be carried on by their so doing. "Whoever, as a matter of practice, manages the affairs of a trading corporation, must of necessity be able to use the seal for those acts which he is authorised to perform": *per* Cairns, L.J., *Re Barned's Banking Co.* (1867), L. R. 3 Ch. 105, at p. 116; 37 L. J. Ch. 81.

Grantor may retain possession.

It is not necessary that a deed be physically delivered to the grantee or other party to the deed: *Alford* v. *Lee* (1586), Cro. Eliz. 54; *Doe* d. *Garnons* v. *Knight* (1826), 8 D. & R. 348; 5 B. & C. 671; 4 L. J. (o.s.) K. B. 161; 29 R. R. 355; nor that it should be physically delivered to any person or pass out of the maker's control.

If the delivery is complete and unconditional it is not the less so because the maker retains the deed in his possession: *Xenos* v. *Wickham* (1862), 13 C. B. (N.S.) 381; (1863), 14 C. B. (N.S.) 435; (1867), L. R. 2 H. L. 296; 36 L. J. C. P. 313; 149 R. R. 467.

"In the ordinary case of a deed executed and left with the party's attorney, unless it is delivered to the attorney as an escrow, not to be delivered until the consideration money is paid or some other condition is performed, it operates as a perfect deed": *per* Williams, J., *Kidner* v. *Keith* (1863), 15 C. B. (N.S.) 35, at p. 40; 137 R. R. 370. Cf. *Whelan* v. *Palmer* (1888), 39 Ch. D. 648, 655—6; 57 L. J. Ch. 784; reversed on another point in *Saunders* v. *Shafto*, [1905] 1 Ch., p. 132; 74 L. J. Ch. 110; *Foundling Hospital* v. *Crane*, [1911] 2 K. B. 367; 80 L. J. K. B. 853.

"Everything was done on the part of the company which was intended to be done to complete the execution; and from that moment, although the policy was retained by the company until sent for by the assured or their broker, it was a binding and complete instrument": *per* Mellor, J., *Xenos* v. *Wickham* (1863), 14 C. B. (N.S.) 435, at p. 451; 33 L. J. C. P. 13; 135 R. R. 757.

"The efficacy of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession of it": *per* Lord Cranworth, *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, at p. 323; 36 L. J. C. P. 313; 149 R. R. 467.

"Was it essential that the deed should be given out of the defendant's possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense": *per* Pigott, B., *ibid.*, at p. 309; see also, *Hall* v. *Palmer* (1844), 3 Ha. 532; 13 L. J. Ch. 352; 64 R. R. 399; *Doe* v. *Knight* (1826), 5 B. & C. 671; 4 L. J. (o.s.) K. B. 161; 29 R. R. 355; *Macedo* v. *Stroud*, [1922] 2 A. C. 330; 91 L. J. P. C. 222.

Authorities to the same effect are *Barlow* v. *Heneage* (1702), Prec. Ch. 211; 2 Eq. Ca. Abr. 283, B. 2; *Lady Hudson's Case* (1704), 2 Eq. Ca. Abr. 52, pl. 5; *Clavering* v. *Clavering* (1704),

c. Ch. 235; 2 Vern. 473; 1 Eq. Ca. Abr. 24, pl. 6; affirmed on eal in D. P. (1705), 7 Bro. P. C. 410; *Sepalino* v. *Twitty* 29), Sel. Ca. Ch. temp. King, 75; 2 Eq. Ca. Abr. 287; *Boughton Boughton* (1739), 1 Atk. 625; *Grugeon* v. *Gerrard* (1840), 7. & C. Exch. 119; 54 R. R. 454; *Alleyne* v. *Alleyne* (1845), o. & Lat. 544; *Hope* v. *Harman* (1847), 16 Q. B. 751, n.; 11 . 1097; *Alexander* v. *Brame* (1855), 7 D. M. & G. 525, at 530; 19 Beav. 436; *Phillips* v. *Edwards* (1864), 33 Beav. 440, op. 446, 447; 140 R. R. 208; while *Naldred* v. *Gilham* (1719), '. Wms. 577; 2 Eq. Ca. Abr. 52, pl. 7; *Cotton* v. *King* (1726), '. Wms. 358; 2 Eq. Ca. Abr. 53, pl. 10; and *King* v. *Cotton* 32), 2 P. Wms. 674, are decisions to the contrary.

Concealed deed.

The operation of a deed is not suspended by the fact that the son entitled to the benefit of it is ignorant of its existence.

Where land was limited to A for life, remainder to his son in , remainder to B, and A before the birth of any son surrendered life estate to B, who was unaware thereof until after the birth a son to A, but then accepted the surrender, *held*, the surrender s good: *Sir Simon Leech's Case* (1692), Carth. 250; *S. C. sub n. Thompson* v. *Leach*, 1 Show. 296; 3 Mod. 296; 2 Vent. 198; Lev. 284; 2 Salk. 618.

Voluntary settlement.

Voluntary settlement never communicated to the beneficiaries, ained by the settlor and found after his death among his waste ers, upheld against a subsequent voluntary settlement made olic, and against a will: *Clavering* v. *Clavering* (1704), 2 Vern. , 1 Eq. Ca. Abr. 24, pl. 6; on appeal (1705), 7 Bro. P. C. Ed. n. 410; *Barlow* v. *Heneage* (1702), Prec. Ch. 211; 2 Eq. Ca. r. 283, b. 2; and *Cecil* v. *Butcher* (1821), 2 J. & W. 565; R. R. 213.

Mortgage.

Mortgagor retained mortgage deed in his own possession and not communicate its existence to the mortgagee: it was found r his death. *Held*, that it took effect from its execution and good against creditors: *Exton* v. *Scott* (1833), 6 Sim. 31; R. R. 72; *Fletcher* v. *Fletcher* (1844), 4 Ha. 67; 14 L. J. Ch. 67 R. R. 6; *Re Way's Trusts* (1864), 2 De G. J. & S. 365; L. J. Ch. 49; 139 R. R. 130.

A, being indebted to a bank, executed a mortgage to the bank ch was retained by his solicitor till after A's bankruptcy, and n handed over by the solicitor to the bank. *Held*, that it was d as against the assignee in bankruptcy: *Grugeon* v. *Gerrard* 40), 4 Y. & Col. Ex. 119; 54 R. R. 454; *Sharp* v. *Jackson*, 99] A. C. 419; 68 L. J. Q. B. 866; *Re McCallum, McCallum McCallum*, [1901] 1 Ch. 143; 70 L. J. Ch. 206; see also, *Wigan English and Scottish Law Life Assurance Association*, [1909] h. 291; 78 L. J. Ch. 120.

Trust estates.

The doctrine applies to trust estates: *Siggers* v. *Evans* (185 5 E. & B. 367; 24 L. J. Q. B. 305; *Standing* v. *Bowring* (188 31 Ch. D. 282; 55 L. J. Ch. 218; *Mallott* v. *Wilson*, [190 2 Ch. 494; 72 L. J. Ch. 664.

Effect of want of notice to trustees.

The operation of a deed is not suspended by the absence notice to trustees, where such notice is essential for perfecting assignment made by the deed: *Donaldson* v. *Donaldson* (185 Kay, 711; 23 L. J. Ch. 788; 101 R. R. 833; *Re Way's Tru* (*supra*).

Escrows.

If an instrument be delivered to take effect on the happeni of a specified event, or upon condition that it is not to be operati until some condition is performed, then pending the happening the event or the performance of the condition the instrument called an escrow. "The maker [of a deed] may so deliver it to suspend or qualify its binding effect. He may declare that shall have no effect until a certain time has arrived, or till so condition has been performed, but when the time has arrived, the condition has been performed, the delivery becomes absolu and the maker of the deed is absolutely bound by it, whether has parted with the possession or not. Until the specified time h arrived, or the condition has been performed, the instrument not a deed. It is a mere escrow": *per* Lord Cranworth, *Xe* v. *Wickham* (1867), L. R. 2 H. L. 296, at p. 323; 36 L. J. C. 313; 149 R. R. 467.

Sheppard's distinctions.

Sheppard draws a distinction between two kinds of escro (i) where the grantor delivers the deed to A to deliver to grantee on fulfilment of a condition or the happening of an eve in which case the deed requires a second delivery to make effective; (ii) where the grantor delivers the deed to take eff upon the fulfilment of a condition or the happening of an eve but without requiring a second delivery, in which case the de becomes effective on the fulfilment of the condition or happeni of the event without more: Shep. Touch. 59.

In Shep. Touch. (p. 58) "two cautions" are given, vi (i) that an apt and proper form of words be used—the instrum must be expressly delivered "as an escrow" and not "as deed"; and (ii) that it must be delivered to a stranger, and to the person who takes the benefit of it. But neither of th propositions is now law. As regards the first proposition: " was not necessary that any express words should be used at time. The conclusion was to be drawn from all the circumstanc It obviated all question as to the intention of the party if at time of the delivery he expressly declared that he delivered it an escrow; but that was not essential to make it an escrow *per* Abbott, C.J., *Murray* v. *Earl of Stair* (1823), 2 B. & C. 82,

No formal words necessary.

88; 3 D. & R. 278; 26 R. R. 282. "It is quite settled that it not necessary, in delivering an instrument as an escrow, to say at it is delivered as an escrow": *per* Sugden, L.C., *Nash* v. *Flynn* 844), 1 Jo. & Lat. 162, at p. 175; 6 Ir. Eq. Rep. 565. And regards the second proposition, the rule laid down in the old oks means that the delivery must be "of a character negativing ; being *a delivery* to the grantee or to the party who is to have e benefit of the instrument. . . . If upon the whole of the ansaction it be clear that the delivery was not intended to be a livery to the grantee at that time, but that it was to be some-ing different, then you must not give effect to the delivery as ing a complete delivery, that not being the intent of the persons ho executed the instrument": *per* Hall, V.-C., *Watkins* v. *Nash* 875), L. R. 20 Eq. 262, at p. 266; 44 L. J. Ch. 505; and see *urness* v. *Meek* (1857), 27 L. J. Ex. 34; 114 R. R. 993.

Escrow may be handed to grantee.

In a case where A. B. and W. were trustees of a sum of £9,000 ing idle in the hands of W., who was also solicitor to the plaintiff mpany which had property to mortgage, and W. prepared a ortgage by the company to A. B. and himself of the property r £9,000, which the company executed and delivered to W., who ever paid the money to the company, it was *held* that the deed as not intended to be delivered as an escrow: but "We are not epared to go so far as to say that as Wynne was himself one of e mortgagees and a party to the deed it could not in point of law an escrow in his hands," and, after referring to authorities, But the language is very general, and we are not at all satisfied at the law is so rigid as to compel the Court to decide that, where ere are several grantees and one of them is also the solicitor of e grantor and of the other grantees and the deed is delivered to m, evidence is not admissible to show the character in which d the terms upon which the deed was so delivered. To exclude ch evidence appears to us unreasonable, and we do not think we e compelled by authority to exclude it": *per* Lindley, M.R., *ndon Freehold and Leasehold Property Co.* v. *Suffield*, [1897] Ch. 608, at p. 621; 66 L. J. Ch. 790; 77 L. T. 445; 46 W. R. 102.

The old rule probably depended on estoppel, for "when there is delivery, that estops the parties to the deed; that is a technical ason why a deed cannot be delivered as an escrow to the other rty": *per* Crompton, J., *Pyne* v. *Campbell* (1856), 6 E. & B. 0, at p. 374; 25 L. J. Q. B. 277; 2 Jur. (N.S.) 641.

The authorities for the old rule are: *Morice* v. *Leigh* (1537), yer, 34 b; *Whyddon's Case* (1595), Cro. Eliz. 520; *S. C. sub nom. hiddon's Case*, Noy, 6; *Perryman's Case* (1598), 5 Rep. 84; *illiams* v. *Green* (1601), Cro. Eliz. 884; Moore, 642; *Blunden* v. *ood* (1605), Cro. Jac. 85; *Thoroughgood's Case* (1612), 9 Rep.

Old authorities.

136 b, at 137 a; *Holford* v. *Parker* (1619), Hob. 246; *Port* v *Midleton* (1650), Styl. 251; *Bushel* v. *Pasmore* (1703), 6 Mod. 217 Co. Litt. 36 a; Vin. Abr. Fait, O., p. 28, where are cited oth cases; and Bl. Com. Bk. II, c. 20 (8th ed., p. 307) (followe *verbatim* and without comment in Stephen's Com. Bk. II, Pt. c. 18, p. 382 (16th ed.)). But *Wilcock* v. *Hewson* (1596), Moor 696; *Hawksland* v. *Gatchel* (1600), Cro. Eliz. 835; and *Johnson* v *Herne* (1602), Noy, 49, are in accordance with the modern lav

Question is one of intention.

Whether the document was delivered as an escrow or as a dee is a question of what the parties intended, and that intention ma appear either from their statements or the circumstances. "Yo are to look at all the facts attending the execution, to all that too place at the time, and to the result of the transaction, and therefor though it is in form an absolute delivery, if it can reasonably b inferred that it was delivered not to take effect as a deed till certain condition was performed, it will nevertheless operate as a escrow": *per* Parke, B., *Bowker* v. *Burdekin* (1843), 11 M. & W 128, at p. 147; 12 L. J. Ex. 329; 63 R. R. 541; and see *Johnso* v. *Baker* (1821), 4 B. & Ald. 440; 23 R. R. 338; *Murray* v. *Ea of Stair* (*supra*); *Grugeon* v. *Gerrard* (1840), 4 Y. & C. Exch. 119 54 R. R. 454; *Gudgen* v. *Besset* (1856), 6 E. & B. 986; 26 L. J Q. B. 36; 3 Jur. (N.S.) 212; 106 R. R. 899; *Millership* v. *Brook* (1860), 5 H. & N. 797; 29 L. J. Exch. 369; 120 R. R. 835; *Kidn* v. *Keith* (1863), 15 C. B. (N.S.) 35, at p. 43; 137 R. R. 370 *Foundling Hospital Governors* v. *Crane*, [1911] 2 K. B. 367; 8 L. J. K. B. 853.

Examples of delivery as escrow.

Thus the delivery of a transfer of mortgage was held to be a escrow until the mortgage money had been paid: *Griffin* v. *Clow* (1854), 20 Beav. 61; 109 R. R. 346; and of a conveyance, unt the purchase-money had been paid: *Phillips* v. *Edwards* (1864 33 Beav. 440, at pp. 446, 447; 140 R. R. 208; *Walker* v. *Wa Ry. Co.* (1865), 35 Beav. 52, at p. 58; 35 L. J. Ch. 94; 14 R. R. 19.

The circumstances relied upon to show delivery as an escro must be prior to or contemporaneous with, not subsequent t the delivery: *Doe* v. *Bennett* (1837), 8 Car. & P. 124.

Evidence of circumstances admissible.

Evidence is, of course, admissible as to what were the circum stances attending the delivery: *per* Jervis, C.J., *Davis* v. *Jon* (1856), 17 C. B. 625, at p. 634; 25 L. J. C. P. 91; 104 R. R. 819 *Wallis* v. *Littell* (1861), 11 C. B. (N.S.) 369; 31 L. J. C. P. 100 132 R. R. 591; and the question is in general one of fact for th jury: *per* Channell, B., *Furness* v. *Meek* (1857), 27 L. J. Ex. 3 at p. 37; 114 R. R. 993; but if the evidence is in writing, as whe the deed is sent enclosed in a letter, the construction of the writin is for the Judge: *Furness* v. *Meek* (*supra*).

Possession by grantee evidence of condition performed.

The possession by the grantee of a deed, delivered to a third rson as an escrow until the performance of a condition, is *prima cie* evidence of the performance of that condition: *Hare* v. *orton* (1833), 5 B. & Ad. 715; 2 N. & M. 428; 3 L. J. K. B. 41; R. R. 633.

An escrow cannot be delivered to take effect only on the antor's death: *per* Coleridge, J., in *Doe* v. *Bennett* (*supra*), at 125; for that "is not a good condition for an escrow": *per* arwell, L.J., in *Foundling Hospital Governors* v. *Crane* (*supra*), p. 379. A deed delivered as an escrow to take effect only on e grantor's death is necessarily testamentary, operating as a will, d cannot be turned into a deed: *Habergham* v. *Vincent* (1793), Ves. Jun. 204, at p. 231; *In bonis Morgan* (1865), L. R. 1 P. & D. 14; 35 L. J. P. & M. 98; *Foundling Hospital Governors* v. *Crane* *upra*).

No further delivery necessary when condition performed.

After the happening of the event or the performance of the condition upon which the delivery was to be made, the escrow operates s a deed without any further delivery, even though the grantor r grantee or both be dead or have ceased to be *sui juris*: *Perryan's Case* (1598), 5 Rep. 84 a; *Graham* v. *Graham* (1791), 1 Ves. ur. 272 at p. 274; *Coare* v. *Giblett* (1803), 4 East, 85, at p. 94; *opeland* v. *Stephens* (1818), 1 B. & Ald. 593, at p. 606; *Frosett* v. *Valshe* (1617), Sir J. Bridgman, 49, at p. 51 (where the grantor, eing a *feme sole* when the deed was delivered as an escrow, married efore the condition was performed); but an authority to a solicitor receive the purchase money, implied by his holding the deed, is etermined by the death of the grantor: *Newton* v. *Metropolitan ailway* (1861), 10 W. R. 102; 1 Dr. & Sm. 583; 127 R. R. 123.

Grantor must have capacity on delivery as escrow.

The grantor, moreover, must have had capacity to execute the eed when it was delivered as an escrow; it is not enough that he as that capacity when the condition is performed: Shep. Touch. 9; *Butler and Baker's Case* (1590), 3 Rep. 25 a, at p. 35 b; though robably no estate passes till the performance of the condition. ee Preston, Shep. Touch. 59, and 3 Prest. Abst. 65, and *per* arwell, L.J., in *Foundling Hospital Governors* v. *Crane* (*supra*), p. 377, but see *Hooper* v. *Ramsbottom* (1815), 6 Taunt. 12; Marsh. 414; 4 Camp. 121; 4 Cru. Dig. 30.

Equitable relief.

Equity will, of course, relieve against a deed delivered on the ith of others executing it, even if the delivery be complete, and ot upon condition if the others fail to execute it. "It is well ttled that if two persons execute a deed on the faith that a third arty will do so, and that is known to the other parties to the deed, e deed does not bind in equity if the third refuses to execute, and nsequently on that ground the deed could not have bound the vo": *per* Jessel, M.R., in *Luke* v. *South Kensington Hotel Co.*

(1879), 11 Ch. D. 121, at p. 125; 48 L. J. Ch. 361; see also *Pet* v. *Peto* (1849), 16 Sim. 590; 80 R. R. 154; *Bolitho* v. *Hillyc* (1865), 34 Beav. 180; 13 W. R. 600. But such an equity "mus be alleged and proved": *per* James, L.J., in *Ex p. Hardin* (1879), 12 Ch. D. 557, at p. 564. Authorities for the propositio are: *Underhill* v. *Horwood* (1804), 10 Ves. 209, at p. 225; 14 R. R. 667; *Carew's Case* (1855), 7 D. M. & G. 43, at p. 52; 10 R. R. 22; *Evans* v. *Bremridge* (1855), 2 K. & J. 174; (1856 8 D. M. & G. 100; *Cumberlege* v. *Lawson* (1857), 1 C. B. (N.S 709; 26 L. J. C. P. 120; 5 W. R. 237; 107 R. R. 869; and *Bond* v *Walford* (1886), 32 Ch. D. 238; 55 L. J. Ch. 667; but in the las case the doctrine above mentioned was not referred to, and th decision was based upon principles appropriate to cases wher marriage settlements are set aside after execution when the intende marriage is abandoned.

Surety.

The question generally arises in cases of suretyship, and th equity "is founded on the sensible principle that a surety entitled to have the original contract intended by him and a parties carried out": *per* Field, J., *Beckett* v. *Addyman* (1882 9 Q. B. D. 783, at p. 789; 51 L. J. Q. B. 597; *Ward* v. *Nation Bank of New Zealand* (1883), 8 App. Ca. 755; 51 L. J. P. C. 65 but where A executed a bond as the joint and several bond of and B, having no authority from B, the bond was held the goo several bond of A: *Elliot* v. *Davies* (1800), 2 Bos. & P. 338 5 R. R. 616.

Disclaimer by grantee.

Upon the delivery of a deed the estate thereby granted vest and remains in the grantee unless and until he disclaims: 4 Cru Dig. 404; Shep. Touch. 284, 285; *Butler and Baker's Case* (1590 3 Rep. 25 a, at p. 26 b; *Swaine* v. *Holman* (1616), Hob. 205 *Smyth* v. *Wheeler* (1671), 2 Keb. 772; *Sir Simon Leech's Case* (1690), Carth. 250; overruling *S. C. sub nom. Thompson* v. *Leach* 2 Vent. 198; 3 Mod. 296; 1 Show. K. B. 296; 3 Lev. 284; 2 Sall 618; *Crewe* v. *Dicken* (1798), 4 Ves. 96; *Siggers* v. *Evans* (1855 5 E. & B. 367; 24 L. J. Q. B. 305; 103 R. R. 521; *Mallott* v *Wilson*, [1903] 2 Ch. 494; 72 L. J. Ch. 664; as the law presum his assent: 4 Cru. Dig. 9; unless, of course, at the time of deliver he repudiates the delivery and disclaims: per Willes, J., *Xenos* v *Wickham* (1862), 13 C. B. (N.S.) 381, at p. 391. It has bee doubted whether the doctrine of presumed assent applies to me cantile documents: see per Pollock, C.B., *Xenos* v. *Wickha* (1863), 14 C. B. (N.S.) 435, at p. 474; and *per* Willes, J., *S.* 36 L. J. C. P. 313; 149 R. R. 467; (1867), L. R. 2 H. L. 297, p. 315; though Lord Cranworth, *ibid.*, at p. 324, said he knew nothing intermediate between a deed and an escrow.

Disclaimer avoids deed.

Disclaimer avoids the deed *ab initio*: Shep. Touch. by Preston

. 285 (explained by Bryne, J., in *Mallott* v. *Wilson* (*supra*), at . 501); but it is said that a release to uses cannot dissent, so as o defeat the uses : Cru. Dig. 4, tit. Deed, c. 12, ss. 47, 48, p. 131; iting *Gorton's Case*, Gilb. Uses, 224, 505 (3rd ed.), and 2 Roll. Abr. 787; but under a modern disentailing deed, where the grant was to the trustees and their heirs, to the use of the trustees and their heirs upon trust for the beneficial owner, it was held that the trustees, being in by the common law, had an estate which they could disclaim : *Peacock* v. *Eastland* (1870), L. R. 0 Eq. 17; 39 L. J. Ch. 534; and the deed was thereby rendered noperative.

No disclaimer after acceptance.

And if the estate is once accepted, it cannot afterwards be disclaimed, and the execution of an indenture by the grantee is evidence of acceptance : 4 Cru. Dig. 404; Shep. Touch. 70; Preston n Shep. Touch. 285; *Urch* v. *Walker* (1838), 3 Myl. & Cr. 702; L. J. Ch. 292; 44 R. R. 360; *Edmunds* v. *Edmunds*, [1904] P. 362, at p. 374; 73 L. J. P. 97; the reasons given by the learned Judge for the decision may perhaps be criticised, but the decision that the property passed on the execution of the deed is clearly right. A disclaimer by a trustee of the trusts of part of the property was held to be of no effect in *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228; 65 L. J. Ch. 184.

Release is not disclaimer.

A disclaimer must be an actual disclaimer of all interest; a release cannot be construed as a disclaimer, as it imports an acceptance of the estate thereby released : *Crewe* v. *Dicken* (1798), 4 Ves. 97; *Nicloson* v. *Wordsworth* (1818), 2 Swanst. 365; 19 R. R. 86; *Doe* v. *Stagg* (1839), 5 Bing. N. C. 564; 50 R. R. 803. A mere refusal to accept the income of a trust legacy may not amount to a complete disclaimer of all benefit, and where interested parties have not changed their position on the faith of the refusal, the refusal can be retracted *quoad* future income : *Re Young*, [1913] 1 Ch. 272; 82 L. J. Ch. 171 (*c*).

Partial execution.

"It is impossible in law to execute a deed in part only" : per *Curiam* (Lord Campbell, C.J., and Coleridge, Erle and Crompton, JJ.), *Wilkinson* v. *Anglo-Californian Gold Mining Co.* (1852), 18 Q. B. 728, at p. 731; 21 L. J. Q. B. 327; in which case an averment of execution of a deed except as to a certain clause was

(*c*) As to the effect of disclaimer of a prior estate upon the estates in remainder by acceleration or otherwise, see *Re Scott*, [1911] 2 Ch. 374; 80 L. J. Ch. 750 (a case of legal limitations); *Re Willis*, [1917] 1 Ch. 365; 86 L. J. Ch. 336; and *Re Conyngham*, [1921] 1 Ch. 491; 90 L. J. Ch. 364 (both cases of equitable limitations), all of which were decisions upon wills. On disclaimer, generally, see Elph. Introd. 7th ed., p. 614; 1 Key & Elph. Prec. 11th ed., p. 805; Davidson's Prec. 3rd ed., vol. 5, Pt. I, pp. 661—664; Lewin on Trusts, 12th ed., p. 219—224; Carson's Real Property Statutes, 2nd ed., pp. 320, 321, 3rd ed., p. 350, 351. As to disclaimer by a corporation, see Law of Property Act, 1925, 180.

held not to be a sufficient allegation of execution : but in a later case it was held that a note, confining the execution by a creditor of a creditor's deed to certain specified debts, could not be treated as a non-execution, but that the executing parties were bound they having accepted benefits under the deed; Sir R. Collier, in giving the judgment of the Privy Council, saying : "It is not every attempt by a form of execution to restrain the full operation of a deed which can be treated as a non-execution of it" : *Exchange Bank of Yarmouth* v. *Blethen* (1885), 10 A. C. 293, at p. 299; 54 L. J. P. C. 27.

Attestation.

Attestation of the signature, sealing or delivery of the deed is not necessary to make a deed as such valid : Co. Litt. 6 a, 7 a, 7 b Bl. Com. Bk. II, c. 20 (8th ed., p. 307); *Goddard's Case* (1583) 2 Rep. 4 b, at p. 5 a; *Garrett* v. *Lister* (1662), 1 Lev. 25; but of course in practice it should never be omitted, and in the case of many instruments attestation is required by law.

Where attestation is not necessary to the validity of the deed an attesting witness need not prove : Common Law Procedure Act 1854 (17 & 18 Vict. c. 125, s. 26); *Worthington* v. *Moore* (1891), 64 L. T. 338; but it is usual on petitions in Chancery and Lunacy *Re Rice* (1886), 32 Ch. D. 35; 55 L. J. Ch. 799.

Meaning of attestation.

Attestation means "that one or more persons are present at the time of the execution *for that purpose*" (*i.e.*, for the purpose of attesting the execution), "and that as evidence thereof they sign the attestation clause, stating such execution" : *per* Lord Romilly, M.R., *Wickham* v. *Marquis of Bath* (1865), L. R. 1 Eq 17, at p. 24; 35 L. J. Ch. 35; 147 R. R. 23. The witness must sign as witness and for the purpose of attesting the execution : *Ricketts* v *Loftus* (1841), 4 Y. & C. Ex. 519, 524; 160 E. R. 1112; 54 R. R. 508; *Freshfield* v. *Reed* (1842), 9 M. & W. 404; 11 L. J. Ex 193; 60 R. R. 769; and consequently a party to the deed cannot be a witness : *Coles* v. *Trecothick* (1804), 9 Ves. 234, at p. 251; 7 R. R 167; *Freshfield* v. *Reed* (*supra*); *Wickham* v. *Marquis of Bath* (*supra*); *Seal* v. *Claridge* (1881), 7 Q. B. 516; 50 L. J. Q. B. 316 See also *Re Parrott*, [1891] 2 Q. B. 151; 60 L. J. Q. B. 567. As to attestation generally, see *Burdett* v. *Spilsbury* (1843), 10 Cl. & Fin 340; 59 R. R. 105.

Attestation of seal of corporation.

Directors in whose presence the seal of a corporation is affixed where the regulations of the corporation require the seal to be affixed in their presence, are not witnesses; they attest the sealing as part of the operation of sealing and not as witnesses. It therefore frequently happens that the deed of a company is not attested within the meaning of the word as ordinarily used, *i.e.*, signed by independent persons for the purpose of recording the fact that the deed was duly executed in their presence : *Shears* v. *Jacob* (1866

L. R. 1 C. P. 513; 35 L. J. C. P. 241; *Deffell* v. *White* (1866), L. R. 2 C. P. 144; 36 L. J. C. P. 25.

For the execution and attestation of deeds executed after the commencement of the Act, see section 74 of the Law of Property Act, 1925. New Law.

The importance of an attestation clause is increased by the practice laid down in many cases that when the clause is in the usual form and the signature proved, the jury will be advised to presume sealing and delivery. See Taylor on Evidence (11th ed., s. 149), where many cases are cited; Sug. Pow. (8th ed., p. 232); *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, *per* Chelmsford, L.C., at p. 320; 36 L. J. C. P. 313; 149 R. R. 467; *Re Sandilands* (1871), L. R. 6 C. P. 411; *sub nom. Re Mayer*, 40 L. J. C. P. 201; *Evans* v. *Grey* (1882), 9 L. R. Ir. 539.

Execution by lunatic.

The committees of a lunatic who executed a deed for him, put to such deed two seals, and signed their own names. *Held*, a sufficient execution: *Lawrie* v. *Lees* (1880), 14 Ch. D. 249; (1881), 7 Ap. Ca. 19; 51 L. J. Ch. 209; though the proper form in such case is for the committee to sign the name of the lunatic, adding "by so-and-so, his committee." (See also Law of Property Act, 1925, s. 22.)

Execution by attorney.

"It has been settled, and it is not for us to question the propriety of that decision, that where an attorney describes himself as an attorney, and professes to grant as an attorney and executes as an attorney, but does not execute in the name of and on behalf of his principal, that is a bad execution": *per* James, L.J., *Lawrie* v. *Lees* (*supra*). See also *Combe's Case* (1614), 9 Co. Rep. 75 a; *Frontin* v. *Small* (1720), 1 Stra. 705; 1 Ld. Ray. 1418; *Wilks* v. *Back* (1802), 2 East, 142; 6 R. R. 409.

New Law.

But the law relative to execution by attorney is now regulated by sections 123, 124, 126 and 127 of the L. P. Act, 1925, and section 29 of the Trustee Act, 1925. A married woman, formerly incapable of executing a valid power of attorney (*Kenrick* v. *Wood* (1869), L. R. 9 Eq. 333, at p. 337; 39 L. J. Ch. 92), has now, whether an infant or not, by virtue of section 129 of the L. P. Act, 1925, power as if she were unmarried and of full age, by deed to appoint an attorney to execute any deed or do any other act which she might herself execute or do.

Married woman may appoint attorney.

Power to execute a deed must be under seal.

A power of attorney to execute a deed can only be given by an instrument under seal; *Hibblewhite* v. *M'Morine* (1840), 6 M. & W. 200, at p. 214; 9 L. J. Ex. 217; 55 R. R. 578; *Hunter* v. *Parker* (1840), 7 M. & W. 322, at p. 343; 10 L. J. Ex. 281; 56 R. R. 723. "It is well-known law that an agent cannot execute a deed, or do any part of the execution which makes it a deed, unless he is appointed under seal," *per* Bowen, L.J., in *Powell* v. *London and*

Provincial Bank, [1893] 2 Ch. 555, at p. 563; 62 L. J. Ch. 795; but the memorandum of association of a company is not a deed, and it is not necessary that the authority to sign it should be given by deed: *Re Whitley Partners, Ltd.* (1886), 32 Ch. D. 337; 55 L. J. Ch. 540. A company may, by writing under its common seal, authorise an attorney to execute deeds on its behalf in any place not situate in the United Kingdom: section 78 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69).

New Law. As to the execution by an attorney of deeds on behalf of corporations, see section 74 of the L. P. Act, 1925.

Power of attorney by a trustee. "I have no doubt myself that a trustee can execute a deed by an attorney, and can empower that attorney to receive, or join in receiving, trust money, and that section 2 of the Trustee Act, 1888, will protect a purchaser in paying money to a person so authorised to act. . . . The solicitor to receive the money under section 2 of the Trustee Act, 1888, must be appointed by the trustee himself": *per* Lindley, L.J., in *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269, at p. 280; 62 L. J. Ch. 783. A

New Law. trustee can now by power of attorney delegate the execution of the trusts during his absence abroad: Trustee Act, 1925, s. 25.

Bill of Sale. A valid bill of sale can be executed by attorney, and the grantor is not necessarily excluded from being such attorney: *Furnivall* v. *Hudson*, [1893] 1 Ch. 335; 62 L. J. Ch. 178.

Special power of appointment. If a special power of appointment is executed by an attorney the power should be limited to executing the deed. The donee must himself first exercise the discretionary power, but may then delegate to an attorney the execution of the deed in order to complete the appointment: *Re Airey*, [1897] 1 Ch. 164; 66 L. J. Ch. 152.

Personation. Where a son, being heir-at-law and one of the executors and devisees in trust of his father's will, and having the same name as his father, executed mortgages of freeholds and leaseholds, personating his father and suppressing his father's death and will, it was held that nothing passed by the mortgages as the deeds were forgeries: *Re Cooper; Cooper* v. *Vesey* (1882), 20 Ch. D. 611; 51 L. J. Ch. 862; followed in *Re De Leeuw*, [1922] 2 Ch. 540; 91 L. J. Ch. 617. Cf. *Fung Ping Shan* v. *Tong Shun*, [1918] A. C. 403; 87 L. J. P. C. 22.

Grantee bound by deed not executed by him. Though execution of a deed is necessary to bind the grantor, yet a party who takes the benefit of a deed is bound by it though he does not execute it: Littleton, s. 374; Co. Litt. 230 b, 231 a; Com. Dig. tit. Fait, A 2; Y. B. 8 Edw. 4 (1468) 8 b; *Brett* v. *Cumberland* (1619), 2 Roll. Rep. 63; *R.* v. *Houghton-le-Spring* (1819), 2 B. & Ald. 375; *Webb* v. *Spicer* (1849), 13 Q. B. 886; 78 R. R. 540; *Formby* v. *Barker*, [1903] 2 Ch. 539; at p. 549

L. J. Ch. 716; *May* v. *Belleville*, [1905] 2 Ch. 605; 74 L. J. Ch. ; *Elliston* v. *Reacher*, [1908] 2 Ch. 665, at p. 673; 78 L. J. Ch. ; *Chambers* v. *Randall*, [1923] 1 Ch. 149; 92 L. J. Ch. 227; and h non-executing party can sue on covenants with him contained the deed: *Archard* v. *Coulsting* (1843), 6 Man. & Gr. 75, at 78.

New Law.

A person not named as a party to a conveyance or other trument may nevertheless take the benefit thereof: see Law Property Act, 1925, s. 56, sub-s. 1.

Formalities.

Any formality, such as enrolment, requisite by statute or at v to make a deed complete, may be completed at any time after e execution of the deed, even after the death of the grantor: . 2 Inst. 674, p. 10; *Hall* v. *Winckfeild* (1617), Hob. 195; *rry* v. *Bowes* (1682), 1 Vent. 360; T. Jones, 196; provided, of urse, that such formality is completed within the time limited by e statute or the law: *Re Piers' Estate* (1863), 14 Ir. Ch. Rep. 2; *Whitmore-Searle* v. *Whitmore-Searle*, [1907] 2 Ch. 332; 76 J. Ch. 576 (in which case it was also held that the protector uld consent to a disentailing assurance after the death of the nant in tail) but formalities required, under the terms of an strument creating a power, for the execution thereof, must be mpleted during the life of the person executing the power: *gges' Case* (1600), 1 Rep. 173, a; *Hawkins* v. *Kemp* (1803), 3 ast, 410; *Wright* v. *Wakeford* (1812), 4 Taunt. 213; *Doe* v. *ach* (1814), 2 M. & S. 576; 15 R. R. 361; but many such for- alities are now rendered unnecessary by the Law of Property nendment Act, 1859, s. 12, re-enacted by section 159 of the Law Property Act, 1925.

Indentures and deeds poll.

The distinction between indentures and deeds poll, which is not s is commonly supposed) the same as the distinction between eds *inter partes* and deeds not *inter partes*, is not now of any portance, and in fact it appears now to be the practice not to dent modern deeds, and by the Real Property Act, 1845, s. 5, w replaced by the Law of Property Act, 1925, s. 56, sub-s. 2, denting a deed is rendered unnecessary. "All deeds are either dented or poll. The deed indented (which is that which is called indenture), is when the paper or parchment is cut and indented. . And it is defined to be a writing containing a conveyance, rgain, contract, covenants or matter of agreement between two more [persons;] and is indented in the top or side answerable n ancient times though not in modern practice] to another that ewise doth comprehend the selfsame matter. And this [instru- ent] is so called because it is so indented; for albeit it be called indenture, and begin in these words, *haec indentura*, etc., yet if be not actually indented, it is no indenture. And on the other

side, if it be not so called, or these words be omitted, yet if it l indented, it is an indenture" : Shep. Touch. 50.

New Law.

By section 57 of the Law of Property Act, 1925, "Any dee whether or not being an indenture, may be described (at the cor mencement thereof or otherwise) as a deed simply, or as a conve ance, deed of exchange, vesting deed, trust instrument, settlemer mortgage, charge, transfer of mortgage, appointment, lea or otherwise according to the nature of the transaction intend to be effected."

Deeds poll.

"The deed poll is that which is plain, without any indenti when the parchment or paper is polled or cut even [or is n intentionally an indenture, though it may not be polled or c even]" : Shep. Touch. 50.

"These deeds [poll] also are sometimes in the first person *noveritis, &c., me,* A. B., *&c., dedi et concessi, &c.* [read *dediss &c.*]. And albeit it be an indenture so made, yet it is go enough" : Shep. Touch. 51; *Anon.* (1572), 3 Leon. 16. "A sometimes they are made in the third person, as *haec indentu testatur, &c., quod idem* A. B., *&c., dedit et concessit, &c.*" : She Touch. 51.

"The deed poll is usually made in the first person; but if it made in the third person it is good enough" : Shep. Touch. 51.

Person not a party cannot sue on covenants made with him by deed *inter partes.*

There does, however, appear to be a distinction which is still importance between deeds made *inter partes* and deeds not so mad for it is a rule of law that no person can sue on a covenant ma with him in a deed made *inter partes*, unless he be a party to su deed, and this is the case even if he execute the deed.

In the case of *Scudamore* v. *Vandenstene* (1579), cited in 2 C Inst. 673, where one Pitman, not being named among the parti to an indenture, signed, sealed, and delivered the same: t defendant pleaded the release of Pitman; the plaintiff demurre *Held*, Pitman's release no bar, for he was not a party to the inde ture. "And the diversity was taken and agreed betweene indenture reciprocall betweene parties on the one side and part on the other side as this was; for there no bond, covenant or gra can be made to or with any that is not party to the deed. B where the deed indented is not reciprocall, but is without 'between &c.,' as, *omnibus Christi fidelibus, &c.*, there a bor covenant or grant may be made to divers severall persons."

To the same effect are *Bland* v. *Inman* (1631), 2 Roll. Ab. 45 *Offly* v. *Warde* (1668), 1 Lev. 235; and *Gilby* v. *Copley* (168 3 Lev. 138. The same doctrine was discussed in *Lowther* v. *Ke* (1723), 8 Mod. 115, and was laid down in the more modern ca of *Storer* v. *Gordon* (1814), 3 M. & S. 308; 15 R. R. 499; *Metca* v. *Rycroft* (1817), 6 M. & S. 75; *Berkeley* v. *Hardy* (1826),

& C. 355; 4 L. J. (o.s.) K. B. 184; 29 R. R. 261; *Lord Southamp-* v. *Brown* (1827), 6 B. & C. 718; 5 L. J. (o.s.) K. B. 253; 30 R. 511; *Gardner* v. *Lachlan* (1836), 8 Sim. 123, at p. 126; 5 L. J. 332; 42 R. R. 124; *Ex p. Cockburn* (1864), 33 L. J. Bky. 17, at 20; 143 R. R. 468; *Chesterfield Colliery Co.* v. *Hawkins* (1865), 3 & C. 677; 34 L. J. Ex. 121; 140 R. R. 677.

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Unless they relate to tenements or hereditaments.

The statement of Lord Coke in the quotation from *Scudamore* v. *ndenstene*, *ubi sup.*, that no *grant* can be made to a person t a party to the deed was never true except of grants of imme- ite estates or interests, and as to such estates and to covenants pecting tenements or hereditaments the law was altered by tion 5 of the Real Property Act, 1845, which enacted "that der an indenture executed after the first day of October, 1845, immediate estate or interest in any tenements or hereditaments, d the benefit of a condition or covenant respecting any tenements hereditaments, may be taken although the taker thereof be not med a party to the same indenture." See *Kelsey* v. *Dodd* 881), 52 L. J. Ch. 34; *Forster* v. *Elvet Colliery Co.*, [1908] 1 B. 629; 77 L. J. K. B. 521; *Dyson* v. *Forster*, [1909] A. C. 98; L. J. K. B. 246; but "the old rule of law that no one can sue a covenant in an indenture who is not mentioned as a party to it *Berkeley* v. *Hardy* (*supra*)—still holds good, except so far as it s been altered by the Real Property Act, 1845, s. 5": *per* rwell, L.J., in *Forster* v. *Elvet Colliery Co.* (*supra*), at p. 639.

New Law.

Section 5 of the Real Property Act, 1845, has been repealed by e Law of Property Act, 1925, which, by section 56, sub-section 1, ovides that "a person may take an immediate or other interest land or other property, or the benefit of any condition, right of try, covenant or agreement over or respecting land or other operty, although he may not be named as a party to the nveyance or other instrument."

Contra as to deeds not *inter partes*.

The rule never applied except to deeds *inter partes*; a deed poll uld always be sued on by any person with whom the covenant s made, and an indenture not *inter partes* is for this purpose a ed poll: *Clement* v. *Henley* (1643), 2 Roll. Ab. 22, Fait, F. 2; *oker* v. *Child* (1673), 2 Lev. 74; *S. C. sub nom. Coker* v. *Child*, Keb. 115; *Lucke* v. *Lucke* (1685), Lutw. 110, fo. 302; *Sunder- nd Marine Insurance Co.* v. *Kearney* (1851), 16 Q. B. 925; 20 J. Q. B. 417 (*d*). But on the other hand a person who seals a ed in which he is not named as a party may be liable on venants therein: *Salter* v. *Kidley* (1689), Holt 210; Carth. 76; Prest. Conv. 415.

(*d*) A contract contained in a deed poll (*Otway* v. *Braithwaite* (1678), Finch. 5) and in a bond (*Butler* v. *Powis* (1845), 2 Coll. 156; 70 R. R. 173) was cifically enforced; Fry on Specific Performance (6th ed.), p. 226.

erparts. "All the parts of a deed indented in judgment of law do ma
up but one deed, and every part is of as great force as all the pa
N together, and they are esteemed the mutual deeds of either part
and either party may be bound by either part of the same. A
the words of the indenture are the words of either party": She
Touch. 52; Y. B. 38 H. 6 (1459), 25.

"Although both parts of the indenture are but as one deed y
the part of the grantor is the principal and the other is not but
counterpart, . . . and if there be any difference between the part
the counterpart shall be made to agree with the principal, a
the error shall be deemed the misprision of the clerk": She
Touch. 53.

But the counterpart may be looked at for the purpose of correc
ing a manifest clerical error in the original, *e.g.*, where by a leas
executed by the lessor only, the property was demised for ninet
four and a quarter years, "yielding and paying therefor during t
said term of ninety-one and a quarter years" a yearly rent, a
the counterpart, executed by the lessee only, had ninety-one in t
habendum as well as the *reddendum*, it was *held*, that there bei
a manifest clerical error in the lease, the counterpart might
looked at for the purpose of ascertaining what the mistake wa
Burchell v. *Clark* (1876), 2 C. P. D. 88; 46 L. J. C. P. 11
Matthews v. *Smallwood*, [1910] 1 Ch. 777; 79 L. J. Ch. 322.

Memorial. So, in Ireland, a memorial, executed by the grantee only, w
admitted in evidence to show that interlineations in the origin
deed, which was produced, were made before execution of t
deed: *Brown* v. *Armstrong* (1873), Ir. R. 7 C. L. 130.

New Law. The Law of Property Act, 1925, requires a deed or writing
the following cases:—

Sect. 52.—(1) All conveyances of land or of any interest there
are void for the purpose of conveying or creating a legal esta
unless made by deed.

(2) This section does not apply to—

(a) assents by a personal representative;

(b) disclaimers made in accordance with section fifty-four
the Bankruptcy Act, 1914, or not required to
evidenced in writing;

(c) surrenders by operation of law, including surrende
which may, by law, be effected without writing;

(d) leases or tenancies or other assurances not required
law to be made in writing;

(e) receipts not required by law to be under seal;

(f) vesting orders of the court or other compete
authority;

(g) conveyances taking effect by operation of law.

Instruments required to be in writing.

Sect. 53.—(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol—

(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

Creation of interests in land by parol.

54.—(1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

(2) Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.

CHAPTER II.

ALTERATIONS.

Presumption that alterations made before execution: Materi alterations made by a party: Alterations to carry intentic into effect: Transfers in blank: Material alterations made by stranger: Material alterations defined: Immaterial alteration Fraudulent alterations: Cancellation by accident or mistak Intentional cancellation of seal.

When a deed is produced for construction it may contai alterations or interlineations, and it is necessary to consider th rules relating to those matters; the first is—

Alterations in deed presumed to be made before execution.

> Alterations and interlineations in a deed ar presumed, in the absence of evidence to the cor trary, to have been made prior to execution.

"Of ancient time if the deed appeared to be rased or interline in places materiall, the Judges adjudged upon their view the dee to be voyd. But of latter time, the Judges have left that to th jurors to try whether the rasing or interlining were before th deliverie": Co. Litt. 225 b, citing *Dr. Leyfield's Case* (1610), 1 Rep. 88 a, at p. 92 b.

In the note on this passage in Butler and Hargrave's edition, is said: "'Tis to be presumed that an interlining, if the contrary not proved, was made at the time of making the deed": citir *Trowel* v. *Castle* (1661), 1 Keb. 21.

"There is no proof when these words were interlined, or th they were inserted by the direction of the settlor; therefore I mu look upon them as if they had been originally incorporated in th body of the deed": *per* Reynolds, C.B., *Fitzgerald* v. *Fauconber* (1730), Fitzgibbon's Rep. 207, at p. 214; *Hope* v. *Harman* (1847 16 Q. B. 751, n.; 11 Jur. 1097.

In *Doe* v. *Catomore* (1851), 16 Q. B. 745; 20 L. J. Q. B. 36 83 R. R. 714, Lord Campbell, C.J., after citing the passage fro Coke and Butler and Hargrave's note above quoted, says: "Th

ctrine seems to us to rest upon principle. A deed cannot be ered, after it is executed, without fraud or wrong; and the esumption is against fraud or wrong."

Rule rests upon principle.

"In the case of deeds, the authorities seem to show that, when ere are interlineations, the presumption is that they were made fore execution. And this is consistent with good sense; for every ed expresses the mind of the parties at the time of its execution; d so, to alter it afterwards, would be fraudulent, and in many ses highly criminal": *per* Lord Cranworth, V.-C., *Simmons* v. *udall* (1851), 1 Sim. (N.S.) 115, at p. 136; 89 R. R. 44; and, to e same effect, *per* Wood, V.-C., *Williams* v. *Ashton* (1860), J. & H. 115, at p. 118.

Clauses written below the testimonium of a deed, but previously the sealing thereof, will be accepted in law to be parcel of the ed, just as much as clauses written above the testimonium: *Anon.* 534), Moore, 3, pl. 5; Benloe & Dal. 12, pl. 12; Bendl. 1, pl. 2. ne contrary is stated in Brooke's Abridgment, 327, pl. 72, citing . B. 1 M. (1554) 1; but this is clearly not law. Thus a memo-ndum following the testimonium in a deed of covenant was taken part of the deed: *Thompson* v. *Butcher* (1625), 3 Buls. 300, at 302; *S. C. sub nom. Tomson* v. *Butcher*, Bendl. 154; *Lyburn* v. *arrington* (1816), 1 Starkie, 162, where the indorsement was made ter signing, but before sealing and delivery; *Eales* v. *Conn* (1830), Sim. 65; 33 R. R. 92, where an agreement was indorsed on a ttlement before its execution. A memorandum indorsed on a nd was taken as part of the bond: *Broke* v. *Smith* (1603), oore, 679; *Burgh* v. *Preston* (1800), 8 T. R. 483; 5 R. R. 416; *eele* v. *Wheeler* (1844), 7 Man. & Gr. 665; 8 Scott, N. R. 323; d a memorandum indorsed on a lease as part of the lease: *Flint* *Brandon* (1804), 1 Bos. & P. N. R. 73. See also, *Brewster* v. *dgill* (1710), 12 Mod. 167, at p. 171.

Clauses added on to deeds.

A marriage settlement executed by a conveying party, then ered and re-executed by him, and executed by the other parties, s held not to have been so far executed in the first instance as make a new stamp necessary: *Jones* v. *Jones* (1833), 1 Cr. & M. 1; 2 L. J. Ex. 249.

Alteration of partly executed deed and re-execution.

It is worth observing that if a deed of a common nature be in nt with additions or alterations in writing, the written words are itled "if there should be any reasonable doubt upon the sense l meaning of the whole, to have a greater effect attributed to m than to the printed words, inasmuch as the written words are immediate language and terms selected by the parties them-ves for the expression of their meaning, while the printed words a general formula, adapted equally to their case and that of all er contracting parties upon similar occasions and subjects":

Printed deed altered in writing.

per Lord Ellenborough, C.J., *Robertson* v. *French* (1803), 4 Ea 130, at p. 136; 7 R. R. 535.

Pencil alterations.

"It has been held that the general presumption and probabil are, that where alterations (in a will) in pencil only are ma they are deliberative; where in ink they are final and absolute Wms. Exec. Pt. I, Bk. II, c. 2, s. 5, p. 83 (11th ed.). There d not appear to be any authority as to the effect of pencil alteratic in deeds, but they would probably be disregarded, whether ma before or after execution.

Old rule as to alterations after execution.

With regard to material alterations made after execution t rule, particularly in the older cases, has been often stated follows: "A material alteration in a deed made after executi renders it void." Thus: "When any deed is altered in a poi material, by the plaintiff himself or by any stranger without t privity of the obligee, be it by interlineation, addition, rasing, by drawing of a pen through a line, or through the midst of a material word, the deed thereby becomes void": *Pigot's Ca* (1614), 11 Rep. 26 b; *S. C. sub nom. Winchcombe* v. *Pigot*, 2 Bu 246; *sub nom. Winscombe* v. *Piggott*, 1 Roll. Rep. 39; *sub no Anon.*, Moore, 835; and see *Crediton* (*Bishop*) v. *Exeter* (*Bisho* [1905] 2 Ch. 455; 74 L. J. Ch. 697, which was decided, referri to *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573; 37 L. J. Q. 201, on the footing that the statement in the second resolution *Pigot's Case* (*supra*) must be held only to apply to material alte tions, and is, as it stands, incorrect. The disputed stateme runs: "If the obligee himself alters the deed by any of the sa ways" (*viz.*, by interlineation, addition, erasing, or by drawing pen through the line, etc), "although it is in words not material, y the deed is void, but if a stranger, without his privity, alters t deed by any of the said ways in any point not material, it shall n avoid the deed" (11 Rep. 27 a).

That they avoid the deed.

"If a deed that is well and sufficiently made in its creatic shall be afterwards altered . . . in any material place . . . be t same either by the party himself that hath the property of t deed, or any other whomsoever, except it be by him that is bou by the deed, [or by his order or consent, for he shall not ta advantage of his own wrong,] and be the same with or witho the consent of him to whom it is made or doth belong; in this ca and by either of these means, the deed is become void. . . . B if the alteration be made by the party himself that is bound by t deed in any material or immaterial part thereof, or if a strang without the privity or consent of the owner of the deed shall ma any such alteration in any part of a deed not material, . hereby the deed is not hurt, but it remaineth good notwithstan ing": Shep. Touch. 68, 69.

"That the alteration in this instrument (a bill of exchange) ould have avoided it, if it had been a deed, no person can doubt. nd why, in point of policy, would it have had that effect in a eed? Because no man shall be permitted to take the chance of ommitting a fraud, without running any risk of losing by the vent, when it is detected": *per* Lord Kenyon, C.J., in *Master* v. *iller* (1793), 4 T. R. 320, at p. 329; 2 H. Bl. 140; 1 Sm. L. C. 2th ed.), p. 813.

"The strictness of the rule on this subject, as laid down in *igot's Case*, can only be explained on the principle that a party ho has the custody of an instrument made for his benefit is bound preserve it in its original state. It is highly important for reserving the purity of legal instruments that this principle should e borne in mind, and the rule adhered to. The party who may ffer has no right to complain, since there cannot be any alteration, xcept through fraud or *laches* on his part": *per* Lord Denman, .J., *Davidson* v. *Cooper* (1844), 13 M. & W. 343, at p. 352; 67 . R. 638; on app. from 11 M. & W. 778; 13 L. J. Exch. 276; 63 . R. 756. But the cases cited on p. 34, *supra*, have shown that e rule as stated is far too wide.

Rule so stated is too wide.

It is probable that the reason why the rule was so stated was at, when an altered deed was declared upon by a plaintiff, the oper plea for a party to the deed, who defended the action on e ground of the deed having been altered, was *non est factum*.

Alteration does not avoid deed.

No case can be found in which a deed, or clause of a deed, which oduces its full effect at the instant of execution, such as a conyance of land, has been prevented from taking effect because the ed was altered after execution.

Deed is not avoided by cancellation.

"Where a thing lies in livery, a deed formerly sealed may be ven in evidence relating to it, though the seal be afterwards torn ; for the interest passed by the act of livery that invests the rty with the possession, and the possession that was once transred by the deed doth not return back again, though the deed s cancelled; . . . so, if the conveyance was made by lease and lease, the uses were once executed by the statute, and they do t return back again by cancelling of the deed": Gilbert on Evid. h ed.), p. 95.

Assignment.

Assignment by commissioners of bankrupts to plaintiffs and S. erwards the assignment was cancelled, and another was made the plaintiffs only. *Held*, that the cancelling of the first assignnt did not alter the property, which remained in all three: *thorpe and Farrington* v. *Dorrington* (1672), 2 Lev. 113.

Trust deed.

Decreed that, though a trust deed was cancelled, yet it should divest the estate of the trustees therein named: *Leech* v. *Leech* 75), 2 Rep. Ch. 100.

Rent.

In *Woodward* v. *Aston* (1676), 1 Vent. 296, the Court said th a rent or other grant was not lost by the destruction of the dee as a bond or chose in action was. The reporter adds, "*Quære*, the party himself cancel it," but the answer is, it would mal no difference.

Voluntary settlement.

In *Hall* v. *Hall* (1873), L. R. 8 Ch. 430; 44 L. J. Ch. 444, tl Court decreed the execution of the trusts of a voluntary settleme which the settlor had purposely burned.

Jointure.

A. made an additional jointure to his wife by voluntary co veyance, which he kept in his own power, and he afterwar cancelled the deed. The wife after his death found the dee and recovered by virtue of it: *Lady Hudson's Case*, cited b Wright, L.K., *Clavering* v. *Clavering* (1704), 2 Vern. 473, p. 476; Prec. Ch. 235; 2 Eq. Ca. Abr. 52, pl. 5.

Grant.

"I hold clearly that the cancelling a deed will not dive property which has once vested by transmutation of possessio and I would go farther, and say that the law is the same with respe to things that lie in grant": *per* Eyre, C.J., *Bolton* v. *Bish of Carlisle* (1793), 2 Hy. Bl. 259, at p. 263; and see *R.* v. *Paulso* [1921] A. C. 271, at p. 278; 90 L. J. P. C. 1.

"The cancelling of a deed does not revest the property co veyed": *per* Holroyd, J., *Doe* v. *Bingham* (1821), 4 B. & Al 672, at p. 677; 23 R. R. 438.

Conveyances.

In the important case of *Davidson* v. *Cooper* (*supra*), 11 M. W. 778, at p. 800, Lord Abinger, C.B., in delivering the judgme of the Court, says: "The moment after their execution, the deeds [*sc.* of conveyance] "become valueless, so far as they relate to tl passing of the estate, except as affording evidence of the fact th they were executed. If the effect of the execution of such dee was to create a title to the land in question, that title cannot affected by the subsequent alteration of the deeds; and the pri ciples laid down in *Pigot's Case* ((1614), 11 Rep. 26 b) would n be applicable. But if the party is not proceeding by ejectment recover the land conveyed, but is suing the grantor under b covenants for title, or other covenants contained in the releas there the alteration of the deed in any material point, after i execution, whether made by the party or by a stranger, wou certainly defeat the right of the party suing to recover"; but s as to alterations by a stranger, *infra*.

Assignment.

An assignment by A of all his personal property and effects trustees for the benefit of creditors was held to have passed t property to the trustees, though the deed purported to have parties the scheduled creditors of A, and the schedule was add after the execution by A: *West* v. *Steward* (1845), 14 M. & W. 4 distinguishing *Weeks* v. *Maillardet* (1811), 14 East, 568.

Where registration was necessary to the validity of a deed of rangement with creditors, the execution of the deed by creditors ter registration did not amount to an alteration of the deed so to avoid it or vitiate the registration : *Re Batten* (1889), 22 . B. D. 685; 58 L. J. Q. B. 333. Deed of arrangement.

"There is no ground for saying that, if a deed be altered in a aterial part, it is rendered void from the beginning. It ceases to ve any new operation, and no action can be brought in respect any pending obligation which would have arisen from it had it mained entire; but it may still be given in evidence to prove right or title created by its having been executed, or to prove y collateral fact" : *per* Lord Campbell, C.J., *Agricultural Cattle surance Co.* v. *Fitzgerald* (1851), 16 Q. B. 432, at p. 440; 20 L. J. . B. 244; and see *per* Lord Abinger, C.B., *Hutchins* v. *Scott* 837), 2 M. & W. 809, at pp. 815, 816; 6 L. J. Ex. 186; 46 R. R. 0; *Enthoven* v. *Hoyle* (1853), 13 C. B. 373; 21 L. J. C. P. 100; R. R. 586.

A mortgage in which the christian names of one of the mortgees was altered was held not to have been avoided : *Re Howgate d Osborn's Contract*, [1902] 1 Ch. 451; 71 L. J. Ch. 279. Names.

The mere cancelling of a lease does not, since the Statute of auds, operate as a surrender so as to destroy the estate vested in e lessee : *Magennis* v. *MacCullogh* (1714-25), Gilb. Eq. Rep. 235; *e* v. *Abp. of York* (1805), 6 East, 86; 8 R. R. 413; *Doe* v. *omas* (1829), 9 B. & C. 288; 7 L. J. (o.s.) K. B. 214; 32 R. R. 0; nor to defeat the right of the lessor to recover rent in an action the demise; for the rent being incident to the reversion, such an tion lay for the reversioner at common law, and is founded, not the deed, but on the fact of the demise of which the deed is idence : *Lord Ward* v. *Lumley* (1860), 5 H. & N. 87; 29 L. J. . 322; 120 R. R. 494. Cancellation has no retrospective operan. It does not make a lease void *ab initio* : *per* Lord Atkinson in v. *Paulson*, *supra*, p. 36. See, also, as to the old doctrine, *on* (1562), Moore, p. 35, pl. 116; *Miller* v. *Mainwaring* (1634), . Car. 397; W. Jones, 354. Leases.

An altered deed may be given in evidence, even by the person o altered it, to prove any effect produced by it at the instant of ecution or any right which existed *aliunde*, and of which it is dence. Altered deed given in evidence.

Where a settlement was gained under an indenture of apprenship, and afterwards the deed was materially altered, it was nitted as evidence to show a settlement gained prior to the ration : *Littleham* v. *St. Leonards*, cited Co. Rep. by Fraser, . 6, p. 48, note (*B*) (note to *Pigot's Case*, 11 Rep. 26 b, at 27 a). To prove a right existing *aliunde*.

A lease of which the term was altered was allowed to be given Lease.

in evidence to show the terms and conditions on which a tenant wl was in occupation under a parol agreement upon the terms of tl lease was holding : *Earl of Falmouth* v. *Roberts* (1842), 9 M. & V 469; 11 L. J. Ex. 180; 60 R. R. 790; *Agricultural Cattle Insuran Co.* v. *Fitzgerald* (1851), 16 Q. B. 432, at p. 440; 20 L. J. Q. B. 24

Building contract.

Action by a builder on a *quantum meruit* for extras; the defe dant was allowed to give in evidence a contract which had be altered by his architect to show that the architect's certificate w a condition precedent to any right of action : *Pattinson* v. *Luckl* (1875), L. R. 10 Exch. 330; 44 L. J. Ex. 180.

The true rule to be adduced from the cases is—

Person altering deed cannot sue on it.

> If a material alteration by rasure, interlineatic or otherwise, be made, after execution, in a dee by, or with the consent of, any party thereto, l cannot as plaintiff enforce any obligation containe in it against any party who did not consent t such alteration.

This rule also applies to instruments not under seal : *Master* *Miller* (1791), 4 T. R. 320; (1793) 5 T. R. 367; 2 Hy. Bl. 14 1 Smith's L. C. (12th ed.), p. 813.

Examples of alterations by plaintiff.

Bond.

The condition of a bond which is erased is not good : Bro. A Faits, pl. 7; see pl. 9 and 11. Where a man was bound in a sing obligation, and the obligee added a condition; *semble*, that t obligee could not enforce the obligation, though the alterati was to the advantage of the obligor : (1512), Keilw. 162, pl. 164, pl. 7.

Policy.

Policy of insurance altered by the assured without the conse of the underwriters, as to the time of sailing : *Fairlie* v. *Chris* (1817), 7 Taunt. 416; 18 R. R. 515; as to places to be called a *Forshaw* v. *Chabert* (1821), 3 Brod. & B. 158; 23 R. R. 59 *Held*, in each case, that the assured could not recover on the polic Policy of insurance on a ship executed in printed form, without a specific subject of insurance, and the subject-matter afterwar added in writing, *Held*, that the assured could not recover agai underwriters who had not signed the addition : *Langhorn* *Cologan* (1812), 4 Taunt. 330; 13 R. R. 613; see also *Sanderson* *McCullom* (1819), 4 J. B. Moore, 5; *S. C. sub nom. Sanderson* *Symonds*, 1 Brod. & B. 426; 21 R. R. 675, where the addition w held immaterial.

Charter-party.

Alteration made in a charterparty by the broker, who acted f plaintiff, by adding after the words "to sail on or after the 15 day of March next," the words "wind and weather permitting *Held*, that the plaintiff could not enforce the charterpart

Croockewit v. *Fletcher* (1857), 1 H. & N. 893; 26 L. J. Exch. 153; 108 R. R. 882.

Covenant.

M covenants to deliver to W by a certain day "the whole of his mechanical pieces as *per* schedule annexed"; the schedule was annexed by the agent to both parties after the execution of the deed. *Held*, on an action for non-delivery of the articles, that the schedule was a material part of the deed, which was not intelligible without it, and accordingly the defendant succeeded on a plea of *non est factum*: *Weeks* v. *Maillardet* (1811), 14 East, 568, distinguished in *Daines* v. *Heath* (1847), 3 C. B. 938; 16 L. J. C. P. 117; cf. *England* v. *Downs* (1840), 2 Beav., at p. 536; 9 L. J. Ch. 313.

Creditors' deed.

A deed, registered under section 192 of the Bankruptcy Act, 1861, was expressed to be made between the debtor, a surety, and scheduled creditors; at the time of execution no schedule was affixed, but one was afterwards added by the debtor. *Held*, that he could not afterwards set up the deed: *Sellin* v. *Price* (1867), L. R. 2 Ex. 189; 36 L. J. Ex. 93.

Release.

Action on a bill of exchange accepted by the defendant; defendant pleaded a release by deed: it appeared that when the plaintiff executed the deed, which was a creditors' deed, there was a blank opposite his name in the schedule of debts, which was afterwards incorrectly filled up by the defendant: the plaintiff replied *non est factum* and succeeded: *Fazakerly* v. *M'Knight* (1856), 6 El. & B. 795; 26 L. J. Q. B. 30; 106 R. R. 803.

Bond.

Joint and several bond of suretyship by four persons, the liability of two limited to £50 each and of the other two to £25 each, after three had executed, one whose liability was limited to £50 executed, adding "£25 only." The obligee accepted such addition. *Held*, he could not sue the other three, and, as the bond was joint and several, he could not sue the fourth obligor: *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; 65 L. J. Q. B. 173.

Alteration to carry into effect intention of parties.

An alteration made with the consent of all parties, for the purpose of carrying out the intention of the parties at the time of the execution of the deed, does not prevent the person making such alteration from enforcing the deed.

Filling in blanks.

A comparison of the reports of the two actions of *Markham* v. *Fox*, as cited in *Markham* v. *Gonaston* (1599), Cro. Eliz. 626, and 1 Moore, 547, brings out the necessity of consent to the alteration very clearly. In the case as cited in Croke, Markham brought an action on a bond against Fox, who successfully defended it on the plea that blanks, namely, the christian name and place of habita-

tion of a person mentioned in the condition, had been filled up after execution, and therefore that it was not his deed. In the report in Moore, it appears that in a subsequent action on the same bond the plaintiff alleged that the blanks had been filled up *with the consent* of the defendant, and succeeded on demurrer. See the reporter's note in *French* v. *Patton* (1808), 9 East, 351, at p. 354; 9 R. R. 571.

A deed of revocation, and a new settlement made by that deed, though after the sealing and execution of the said deed blanks were filled up in the said deed, and the said deed not read again to the party nor resealed and executed, yet held a good deed: *Paget* v. *Paget* (1688), 2 Chan. Rep. 410.

Particulars of debts.

A conveyance made by A of his property to trustees for the benefit of his creditors, the particulars of whose demands were stated in the deed, but a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the deed in A's presence and with his assent, was supported on the ground that either it was not a deed till the blank was filled up, and that the filling up of the blank in the presence of A was equivalent to execution by him, or that it was originally a deed intended to take effect as soon as the blanks were filled up: *Hudson* v. *Revett* (1829), 5 Bing. 368; 2 Moo. & P. 663; 7 L. J. (o.s.) C. P. 145; 30 R. R. 649; *Rudd* v. *Bowles*, [1912] 2 Ch. 60; 81 L. J. Ch. 277 (the case of a lease).

Names.

In cases, where a person nominated by deed as attorney filled up a blank left for his christian name: *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465; 12 L. J. Ex. 359; 63 R. R. 655; where a blank left for the date was filled up with a date which the Court assumed to be the true date and to be an immaterial alteration: *Keane* v. *Smallbone* (1855), 17 C. B. 179; 25 L. J. C. P. 72; 104 R. R. 648; the deeds were held valid.

Dates.

Where a mortgage was executed with blanks for the names of the tenants, the date of the deed, and the date of the redemption, all of which were subsequently filled in, it was held that, these being merely formal alterations, and made only for the purpose of completing the expression of the intention of the parties to the deed, already apparent on the face of it, the deed as completed was good: *Adsetts* v. *Hives* (1863), 33 Beav. 52; 140 R. R. 14; See also *Rudd* v. *Bowles* (*supra*), and *Crediton* (*Bishop*) v. *Exeter* (*Bishop*), [1905] 2 Ch. 455; 74 L. J. Ch. 797.

Documents not under seal.

The same rule applies to documents not under seal: *Bates* v. *Grabham* (1703), Salk. 444; Holt, 469; *Kershaw* v. *Cox* (1800), 3 Esp. 246; *Byrom* v. *Thompson* (1839), 11 A. & E. 31; 9 L. J. Q. B. 26; 52 R. R. 269.

On the same principle the mere filling up of blanks after execu-

n with the consent of all parties does not, but filling them up thout such consent does, prevent the person making such eration from suing on the deed: Pigott on Recoveries, 213.

Consent only of parties interested.

Alterations may be material as regards some parties and material as regards others; in cases of this kind the consent those parties only to whom the alterations are material is quired: *Doe* v. *Bingham* (1821), 4 B. & Al. 672; 23 R. R. 438; *ll* v. *Chandless* (1827), 12 Moore, 316; 4 Bing. 123.

New obligor.

The insertion with the consent of all parties of the name of an ditional obligor to a bond after execution does not vitiate it: *uch* v. *Clay* (1671), 2 Lev. 35; on the ground, apparently, that operates as a new deed; *S. C.* 2 Keb. 872; 1 Vent. 185; *Matson* v. *oth* (1816), 5 M. & S. 223.

But alteration must express intention at time of execution.

But if an alteration be made in a deed, even with the consent all parties, so as to express an intention which was not the inten- n of the parties to the deed at the time of the execution thereof, party can enforce any obligation contained in the deed as it iginally stood, because such obligations are vacated: *French* v. *tton* (1808), 9 East, 351; 9 R. R. 571; nor can the document altered take effect as a deed unless the document is restamped: *ll* v. *Patton* (1807), 8 East, 373; 9 R. R. 469; though the cument may be evidence of a contract.

Transfers in blank.

In the cases already treated of, where the blanks were filled up th consent of all parties, the object was to carry out the contract eviously made between the parties; but, on the other hand, ere an instrument is executed in the form of a deed, not in rsuance of any previous contract, but with the intention of tting some person to enter into a contract which can be expressed filling his name into the blanks of the instrument, the instru- ent, notwithstanding that the blanks may be filled up, is void *as leed: France* v. *Clark* (1883), 22 Ch. D. 830; 52 L. J. Ch. 362; 884), 26 Ch. D. 257; 53 L. J. Ch. 515; *Société Générale de Paris Tramways Union Co., Ltd.* (1884), 14 Q. B. D. 424; *S. C.* in P. *sub nom. Société Générale de Paris* v. *Walker* (1885), 11 . Ca. 20; 55 L. J. Ch. 169; *Powell* v. *London and Prov. Bank*, 893] 1 Ch. 610; [1893] 2 Ch. 555; 62 L. J. Ch. 795; although may possibly have the effect of showing what was intended to the contract subsequently entered into between the parties: *Barned's Banking Co.* (1867), L. R. 3 Ch. 105; 37 L. J. Ch. 81; l, if a *deed* is not necessary, may take effect as an instrument writing: *Re Tahiti Cotton Co., ex p. Sargent* (1874), L. R. Eq. 273; 43 L. J. Ch. 425. See also *Re Indo-China Steam vigation Co.*, [1917] 2 Ch. 100, at pp. 105, 106; 86 L. J. Ch. .

Inoperative as deeds.

It is said in Lindley on Companies, Bk. III, c. 4, s. 5 (6th ed. p. 654: "Whatever may be the legal method of transferri shares, and whether a formal deed is or is not requisite, it is common practice in the share market for a seller of shares to sig a deed or instrument of transfer with the name of the transfer in blank. The buyer then inserts his own name, or without doi so resells, and hands the blank transfer to the new purchaser, wl again either inserts his own name as the transferee, or resells ar delivers the transfer, still in blank, to the purchaser from him, ar so on. . . . A *deed* executed by A, and purporting to transfer tl property to —— ——, *i.e.*, to nobody, is altogether inoperative a deed; and consequently, if a shareholder in a company, tl shares in which are transferable by deed only, executes a transf of his shares in blank, he still remains legal owner of the share and the holder of the deed acquires no other title to the shar than a right to have them properly transferred, or to have tl transferor declared a trustee for them." See *Hibblewhite* *M'Morine* (1840), 6 M. & W. 200; 9 L. J. Ex. 217; 55 R. R. 57 4 Jur. 769 (overruling *Texira* v. *Evans* (1774), cited in *Master* *Miller* (1791), 1 Anstr. 225, at p. 228); Shep. Touch. 68; *Burgis* *Constantine*, [1908] 2 K. B. 485; 77 L. J. K. B. 1045; and s *Spencer* v. *Ashworth, Partington & Co.*, [1925] 1 K. B. 58 94 L. J. K. B. 447 (overruling *Humble* v. *Langston* (1841 7 M. & W. 517).

Transfers in blank invalid in equity.

The instrument in blank does not at law transfer the ownersh of the shares to which it relates, even as between the vendor ar the purchaser; nor does the purchaser, by taking such a transfe contract any obligation at law to procure himself or any one else be registered as a shareholder, or to indemnify the vendor from tl consequences of his continuing to be a shareholder as betwe himself and the company. A deed of transfer with a blank for tl name of the transferee, is, as a deed, as invalid in equity as at lav and the shares comprised in it remain in equity as at law the pr perty of the transferor: *Tayler* v. *Great Indian Peninsula Ry. C* (1859), 4 De G. & J. 559; 28 L. J. Ch. 709; 124 R. R. 389; *Ex* *Swan* (1859), 7 C. B. (N.S.) 400; *Swan* v. *North British Australasi Co., Ltd.* (1862), 7 H. & N. 603; (1863) 2 H. & C. 175; where tl names of the transferees and the description of the shares we fraudulently added after the execution of a transfer in blank the shareholders; *France* v. *Clark* (*supra*); *Société Générale* *Paris* v. *Walker* (*supra*); *Powell* v. *London and Provincial Ba* (*supra*). See also *Re Indo-China Steam Navigation Co.*, [191 2 Ch. 100; 86 L. J. Ch. 723, where, however, the transfer was n required to be made by deed.

Debentures in blank.

On the same grounds debentures issued in blank cannot be fill

ɔ with the holder's name so as to make them effectual as deeds : *nthoven* v. *Hoyle* (1853), 13 C. B. 373; *Re Queensland Land and oal Co., Davis* v. *Martin*, [1894] 3 Ch. 181; 63 L. J. Ch. 810.

Amplifying description.

Where the names of both vendor and purchaser are inserted in ıe transfer, and the description of the subject-matter is merely mplified after execution, but a contract complete in its essential rms is entered into before execution, the blank being left only ecause the parties are ignorant of the full description of the proerty, the deed as filled up is binding; but, on the other hand, if o complete contract be made before execution, and the description wholly wanting, so that the deed passes nothing, the subsequent lling up of a blank by supplying the whole description will not ass the property; so that the distinction seems to be between lling up an immaterial blank, and supplying a description which ould be wholly wanting, but for the additions made. But *semble*, ven an instrument of the latter class might be supported in equity, ut not as a *deed*; see *per* Lord Cairns, L.J., *Re Barned's Banking o.* (1867), L. R. 3 Ch. 105, at p. 115; 37 L. J. Ch. 81.

Distinguishing *Weeks* v. *Maillardet*.

The case of *Weeks* v. *Maillardet* (1811), 14 East, 568 (*supra*, here the facts are stated), is not at variance with this rule, ecause in that case the plaintiff sued on the deed with the chedule, and therefore the Court could not but give judgment in avour of the defendant's plea, *non est factum*; but it by no means llows that the plaintiff would not have succeeded if he had sued n the deed without the schedule; for the schedule was only an numeration of property, which was perfectly ascertained by the eed without the schedule—that is, the schedule was an immaterial ddition.

Fresh execution not presumed.

As to presuming, if necessary, a fresh execution of the deed after ıe alterations have been made or the blanks filled, see *Goodright . Straphan* (1774), 1 Cowp. 201; *Hudson* v. *Revett* (1829), 5 Bing. 68; 2 Moo. & P. 663; 7 L. J. (o.s.) C. P. 145; 30 R. R. 649; nd *Powell* v. *London and Provincial Bank* (*supra*), discussed *ante*, hap. I. And as to the necessity for a new stamp, see *Bowman . Nichol* (1794), 5 T. R. 537; *Cordwell* v. *Martin* (1807), 1 Camp. 9; *French* v. *Patton* (1808), 9 East, 351; 9 R. R. 571; *Knill* v. *Villiams* (1809), 10 East, 431; 10 R. R. 349; and *Cole* v. *Parkin* 1810), 12 East, 471; *Jones* v. *Jones* (1833), 1 Cr. & M. 721; L. J. Ex. 249.

Material alterations made by a stranger do not affect deeds.

Material alterations made by a stranger, *i.e.*, a person not a party to, or claiming under a party to, the deed, do not prevent any person from enforcing the deed, except a person in whose

custody the deed was when the alteration wa made.

Objections to exception.

Lord St. Leonards (Sugd. Pow. 603 (8th ed.)) considered tha alterations made by a stranger never vitiated the deed, saying tha the true ground of the rule is the fraud of the party interested and he cites *Henfree* v. *Bromley* (1805), 6 East, 309; 8 R. R. 491 which was a case of the alteration, not of a deed, but of an awar by the umpire after his authority had expired; and in which Lor Ellenborough, C.J., said, at pp. 311, 312: "The alteration mad by him [the umpire] afterwards was no more than a mere spolia tion by a stranger, which would not vacate the award. . . . can no more consider this as avoiding the instrument than if i had been obliterated or cancelled by accident."

Exception does not rest upon principle.

"It is difficult to understand why an alteration by a strange should in any case avoid the deed—why the tortious act of a thir person should affect the rights of the parties to it—unless th alteration goes the length of making it doubtful what the dee originally was, and what the parties meant": *Hutchins* v. *Scot* (1837), 2 M. & W. 809, *per* Alderson, B., at p. 814; 6 L. J. Ex 186; 46 R. R. 770.

It may be added that in Ireland and America it has been hel that the act of a stranger will not vitiate a deed: *Swiney* v. *Barr* (1835), 1 Jones' Exch. Rep. 109; *Rees* v. *Overbaugh* (1827), Cowen, 746. But according to *Davidson* v. *Cooper* (1844), 11 M. & W. 778; 13 M. & W. 343; 13 L. J. Ex. 276; 67 R. R. 638, an *The Bank of Hindustan* v. *Smith* (1867), 36 L. J. C. P. 241 the exception above stated does exist: Taylor on Evidence ss. 1827—30 (11th ed.), p. 1220; Steph. Dig. Ev. (10th ed.), Art 89, p. 96; but both Taylor and Stephen disapprove such exception Taylor, *loc. cit.*; Stephen (3rd ed.), Pref., p. xxxvi.

Material alteration defined.

An alteration which, if made before execution would have affected the position, rights or obliga tions of any person claiming under the deed, i material; possibly other alterations may be material

Bills of exchange.

The following have been held to be material alterations in a bi of exchange so as to be a bar to an action thereon:—The altera tion of the date so as to accelerate the day of payment: *Master* v *Miller* (1791—3), 4 T. R. 320; 1 Anstr. 225; 5 T. R. 367; 2 Hy. Bl 141; 1 Sm. L. C. (12th ed.), p. 813; the alteration of the name o the place of payment: *Tidmarsh* v. *Grover* (1813), 1 M. & S. 735 14 R. R. 563; the addition of a place of payment when the bill wa accepted generally: *Cowie* v. *Halsall* (1821), 4 B. & Ald. 197

acintosh v. *Haydon* (1826), Ry. & M. 362; 27 R. R. 757; *Calvert* Baker (1838), 4 M. & W. 417; 8 L. J. Ex. 40; 57 R. R. 663; urchfield v. *Moore* (1854), 3 E. & B. 683; 23 L. J. Q. B. 261; 97 R. R. 706; *contra*, *Trapp* v. *Spearman* (1799), 2 Esp. 57; the dition to a bill, expressed to be for value received, of words ating what the consideration was: *Knill* v. *Williams* (1809), 10 ast, 431; 10 R. R. 349.

Promissory notes.

A joint and several promissory note signed by two persons nnot be sued on if a third person signs without the consent of the o: *Gardner* v. *Walsh* (1855), 5 E. & B. 83; 24 L. J. Q. B. 285; 3 R. R. 377; overruling *Catton* v. *Simpson* (1838), 8 A. & E. 136.

Guarantee.

A guarantee under the hand of the guarantor could not be sued where the creditor affixed a wafer opposite the guarantor's gnature so as to make it appear to be his deed: *Davidson* v. ooper (*supra*).

A guarantee cannot be sued on if the names of some of the arantors are struck out after execution by all: *The Bank of industan* v. *Smith* (1867), 36 L. J. C. P. 241.

Sale note

The alteration of a sale note at the instance of the vendors oviding for damaged goods, prevents them suing on it: *Powell* Divett (1812), 15 East, 29; 13 R. R. 358.

The addition by the buyer to a sold note on a sale by sample, of ords importing that either the sample or the bulk was of the ller's own manufacture, is material and prevents his suing: ollett v. *Wackerbarth* (1847), 17 L. J. C. P. 47; 5 C. B. 181; 75 R. R. 711.

Bank note.

The alteration of the number of a Bank of England note disarges the note as between the Bank and an innocent holder for lue (*a*): *Suffell* v. *Bank of England* (1881), 7 Q. B. D. 270; 882), 9 Q. B. D. 555; 51 L. J. Q. B. 401; *Leeds and County Bank* Walker (1883), 11 Q. B. D. 84; 52 L. J. Q. B. 590.

Sureties.

By a bond of suretyship four persons were to be jointly and verally liable as sureties, but the liability of two was to be limited £25 each, and the liability of the other two to £50 each. After e other three had executed the bond, N., whose liability was to ve been £50, also executed it, but added to his signature "£25 ly," to which the obligee made no objection. *Held*, that this as a material alteration which prevented the obligee suing the her three sureties, and, as the liability was joint, the fourth rety also: *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; L. J. Q. B. 173.

Old law as to immaterial alterations.

It was formerly held that even an immaterial alteration made

(*a*) Cf. *Hong Kong and Shanghai Banking Corp.* v. *Lo Lee Shi*, [1928] N. 23.

by, or with the consent of, the person for whose benefit it wa intended, would render an instrument void : *Pigot's Case* (1614) 11 Rep. 26 b; *S. C. sub nom. Winchcombe* v. *Pigot*, 2 Buls. 246 *sub nom. Winscombe* v. *Piggott*, 1 Roll. Rep. 39; *sub nom. Anon* Moore, 835; Shep. Touch. 68, 69. But this is no longer law, an now—

Immaterial alterations disregarded.

An immaterial alteration made in a deed afte execution, by whomsoever made, does not affec the deed, or the rights of any person thereunder

Immaterial alteration defined.

'An alteration which only expresses somethin which would have been implied in the deed befor the alteration was made is immaterial : *Sanderso* v. *Symonds* (1819), 1 Brod. & B. 426; S. C. *su nom. Sanderson* v. *McCullom*, 4 J. B. Moore, 5 *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573 9 B. & S. 607; 37 L. J. Q. B. 201; *Credito* (*Bishop*) *v. Exeter* (*Bishop*), [1905] 2 Ch. 455 74 L. J. Ch. 697.

Covenant.

An alteration made by the covenantee for the benefit of th covenantor held to be immaterial : *Darcy and Sharpe's Case* (1584) 1 Leon. 282; but see *Anon.* (1512), Keilw. 162, pl. 2; 164, pl. 7.

Bond.

Bond conditioned to pay £100 by six equal instalments c £16 13s. 4d. until the full sum of one pounds was paid; a strange inserted the word "hundred" between "one" and "pounds." *Held*, that such insertion did not alter the sense, was therefor immaterial, and did not destroy the bond : *Waugh* v. *Busse* (1814), 5 Taunt. 707; 15 R. R. 624.

Creditors' deed.

A deed under section 192 of the Bankruptcy Act, 1861, wa expressed to be made between the debtor and certain person named in the schedule as creditors, and all other the creditors c the debtor, and was executed by a majority in number, representin three-fourths in value of his creditors, and was then registered after registration, the names of two additional creditors were adde to the schedule. *Held*, that the alteration was not material, an that, as before registration the necessary number of creditors ha executed, the insertion of the names of the two creditors did no affect the validity of the deed : *Wood* v. *Slack* (1868), L. R. Q. B. 379; 37 L. J. Ex. 130.

Signature erased.

After a deed had been executed, one of the parties drew his pe through his own and another party's signatures; it was admitte that the erasure was made wilfully, and under the impression tha it might influence claims to be made *dehors* the deed, but no frau was intended; the deed contained no grant or covenant by th

rties whose signatures were thus erased, and imposed no liability them; they were simply covenantees. It was held that the ısure was immaterial, and did not avoid the deed: *Caldwell* v. *rker* (1869), Ir. R. 3 Eq. 519; disapproved in *Suffell* v. *Bank of ıgland*, 9 Q. B. D. 555, at pp. 565, 571 and 572; 51 L. J. Q. B. 1.

Date and consideration inserted.

After execution of a transfer the date and consideration were ed in by the transferee: "I assume (without deciding) that the ınsfer was a valid and effectual deed": *per* Stirling, J., *Roots* v. *illiamson* (1888), 38 Ch. D. 485, at p. 492; 57 L. J. Ch. 995. e also *Crediton* (*Bishop*) v. *Exeter* (*Bishop*), [1905] 2 Ch. 455; L. J. Ch. 697.

Name altered.

After execution of a mortgage, the name of a mortgagee was ered from "William" to "Edward Thomas," those being the ıl christian names of the person intended, "William" having en inserted in the deed by inadvertence. *Held*, an immaterial eration: *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451; L. J. Ch. 279.

Immaterial alterations made fraudulently.

Immaterial alterations fraudulently made by a party to the deed em to be treated as material: Taylor, Ev. s. 1830 (11th ed.), 1222, citing *Sanderson* v. *Symonds* (1819), 1 Brod. & B. 426; *C. sub nom. Sanderson* v. *McCullom*, 4 J. B. Moore, 5; the nerican case of *Adams* v. *Frye* (1841), 3 Metc. 103; and other ses.

Old law as to cancellation by accident.

According to the old law the cancellation of a deed by accident mistake prevented it from being sued upon: Shep. Touch. 69.

Debt on a bond; defendant pleaded *non est factum*. After plea d before trial, by negligence of one of the clerks (*quære*, of the urt) who had it in his custody, the seals were eaten off by mice. e jury was charged to find whether it was the deed of the plaintiff the time of the plea pleaded or not: *Nichols* v. *Haywood* (1545), er, 59 b. Jury found defendant sealed and delivered the bond, t that after issue joined the seal was pulled off; judgment for intiff: *Michael* v. *Scockwith* (1588), Cro. Eliz. 120; *S. C. sub n. Michaell's Case*, Owen, 8, where it appears that there were ɔ obligors and the seal of one was taken from the bond. In these es it was of course unnecessary to consider when the seal was led off, unless pulling it off before issue joined would have been answer to the action on the deed. But this is no longer law, l now—

Cancellation by accident or mistake

> The cancellation of a deed by accident or mistake does not affect the deed, or the rights of any person thereunder.

Where the seal was pulled off by a little boy the deed was

allowed to be given in evidence : *Anon.* (1625), Latch, 226; Palr 403.

A certificate of a bishop under the Act of Uniformity w produced which had only a small bit of wax upon it. Twisden, J. "If it was sealed, though the seal be broken off yet it may be rea as we read recoveries after the seal is broken off, and I have see letters of administration given in evidence after the seal broke off, and so of wills and deeds." Accordingly it was read : *Clerl* v. *Heath* (1669), 1 Mod. 11.

"It is not universally true that a deed is destroyed by a alteration, or by tearing off the seal. . . . In any case where th seal is torn off by accident after plea pleaded, the deed is hel good" (see 1 Roll. Rep. 40; *Michael* v. *Scockwith* (*supra*); " . . and in these days, I think even if the seal were torn off befo the action brought, there would be no difficulty in framing declaration which would obviate every doubt upon that point, b stating the truth of the case. . . . The difficulty which arose i the old cases depended very much on the technical forms pleading applicable to deeds alone" : *per* Buller, J., *Master* v *Miller* (1791), 4 T. R. 320, at p. 339; 2 R. R. 399.

"I can no more consider this as avoiding the instrument tha if it had been obliterated or cancelled by accident" : *per* Lor Ellenborough, C.J., *Henfree* v. *Bromley* (1809), 6 East, 309, a p. 312; 8 R. R. 491.

"If the absence of intention to cancel be shown, the thing not cancelled" : *per* Maule, J., *Bamberger* v. *The Commerci Credit* (1855), 15 C. B. 676, at p. 693; 24 L. J. C. P. 115; 10 R. R. 542; and see *Perrott* v. *Perrott* (1811), 14 East, 423.

Intentional cancellation of seal of one party.

The intentional cancellation of the seal of on party to a deed, where the parties are severall bound, does not affect the deed *quoad* the othe parties; but it is otherwise if they be jointl bound.

Charter-party.

Where in a charterparty indented the covenants on the part the master and owners of a ship with the merchants were joint, an the covenants on the part of the merchants were several, it wa resolved that if the seal of one of the merchants was broken fro the deed, it did not avoid the deed, but only against him; but any of the seals of the master or owners had been broken from th deed, all their covenants would have been defeated. When th covenants are several, they are as several deeds written on the sam piece of parchment : *Mathewson's Case* (1598), 5 Rep. 22 b; *S. C sub nom. Mathewson* v. *Lydiate*, Cro. Eliz. 408, 470, 546.

Joint bond.

Thus, in *Bayly* v. *Garford* (1641), March, 125, where defendant's stator was bound in the bond with two others jointly and verally, and afterwards the seals of the others were eaten by mice ıd rats, "the Court . . . did strongly incline that judgment ought be given for the defendant, and their reason was that if the ›ligee by his act or own *laches* discharge one of the obligors where ey are jointly and severally bound, that the same discharges them l; but gave day for the further debating of the case, for that this as the first time it was argued"; and probably in the particular se stated the defendant would have been held bound, as the ncellation was by accident.

Several bond.

Where a bond was several, the cancellation by the obligees of ıe seal of one obligor discharged him alone: *Collins* v. *Prosser* 823), 1 B. & C. 682; 3 Dow. & Ry. 112; 1 L. J. (o.s.) K. B. 212; 5 R. R. 540. But where the bond was joint and several, the ıncellation of the seal of one obligor was held to discharge all: *ayly* v. *Garford* (1641), March, 125; *Seaton* v. *Henson* (1678), Show. K. B. Rep. (Leach's ed.) 29; 2 Lev. 220.

Prima facie evidence of due cancellation.

The production of a cancelled bond is *prima facie* evidence of s due cancellation: *Alsager* v. *Close* (1842), 10 M. & W. 576, p. 583; 12 L. J. Ex. 50.

CHAPTER III.

EXPRESSED INTENTIONS.

Expressed Intentions only regarded: Deeds to take effect thoug form used inept: Voluntary Settlements: If Deed capable taking effect in two ways grantee has election.

THE fundamental rule of interpretation for deeds, as for a instruments, is that—

Expressed intentions.

To interpret a deed, the expressed intention c the parties must be discovered.

Meaning of intention.

The word "intention" may be understood in two senses, a descriptive either (1) of that which the parties intended to do, c (2) of the meaning of the words that they have employed; here is used in the latter sense. See the remarks of Lord Wensleydale *Grey* v. *Pearson* (1857), 6 H. L. C. 61, at p. 106; 26 L. J. Ch. 478 108 R. R. 19; *Abbott* v. *Middleton* (1858), 7 H. L. C. 68, at p. 114 28 L. J. Ch. 110; 115 R. R. 38.

In other words, the question to be answered always is, "Wha is the meaning of what the parties have said?" not, "What di the parties mean to say?" The latter question is one which th law does not permit to be asked; it being a presumption *juris et d jure*, to rebut which no evidence is allowed, that the parti intended to say that which they have said.

In *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, at p. 160, th following rule was laid down by Staunford, J., for interpretin deeds: "Thirdly, that the words shall be construed according t the intent of the parties, and not otherwise; and here he cite what Bracton saith, '*Carta non est nisi vestimentum donationis* and the intent directs gifts more than the words."

"And here first I do exceedingly commend the Judges that a curious and almost subtil, *astuti* (which is the word used in th Proverbs of Solomon in a good sense, when it is to a good end) t invent reasons and means to make acts according to the just inte of the parties, and to avoid wrong and injury, which by rigid rul might be wrought out of the act": *per* Hobart, C.J., *Clanrickar* v. *Sidney* (1615), Hob. 273, at p. 277.

"As far as it may stand with the rule of law, it is honourab

or all Judges to judge according to the intention of the parties, and so they ought to do" : Co. Litt. 314 b.

"The Court cannot understand the true intent of the indenture but only by the words of the indenture" : *Kidder* v. *West* (1684), 3 Lev. 167.

"The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end and object, to the discovery and effectuating of which, all the rules of construction, properly so called, are uniformly directed. When technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct technical meaning; but this is not conclusive evidence that such was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The deed may be drawn unartificially, from ignorance or inadvertence, or other causes; but still, if there is enough clearly to convey information as to the real meaning, the object is attained. The mind is with certainty discovered, and being known, must be the guide, or the act and deed would be not the act and deed of the party, but of the Court. Because the words, which are the signs of the ideas of the persons using them, are in general, and in the correct use of them, the signs of ideas different from those of which in the particular case, they are found less technically and correctly, but with equal certainty, to be the signs; can it follow that they are to be construed, to represent the ideas of which they are known not to be the signs, in preference to those of which they appear to be the signs? Where is the authority that compels the Court to go this length in its adherence to technical meaning? The contrary has been long and universally established to be the rule by the highest authorities from the earliest period, without a single one to the contrary. Many cases may doubtless be found, in which technical meaning has been allowed to prevail notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient to get over the presumption in favour of legal construction. The paramount regard to be had, in a case circumstanced as the present, to the meaning and intention of the grantor, in preference to technical meaning, is the settled rule of construction. If the subject of the instrument, on which the question arises, be one that is not matter of law (over which intention has no control), but depends wholly on the will and act of the party, such as the appointment by a donor in a deed of gift of his own donee; if the words to be construed are not words of limitation (in which a stricter attention

Technical words.

Technical meaning.

Technical legal words.

to forms may be required, especially in deeds), but words o purchase and description made use of to designate the person o the first taker; in such case, if the meaning and intention of th grantor be clearly manifested on the face of the instrument, as t the person or character intended to be the object of grant, and i the words that he has made use of to convey his meaning wil admit of an interpretation conformable to it, though contrary t their correct technical sense, there is no case or *dictum* to be foun which requires the Court to adopt the technical sense in oppositio to the actual meaning of the party; on the contrary, the authoritie uniformly demand the preference to be given to intent, ove technical import and form" : *per* Plumer, M.R., *Cholmondeley* v *Clinton* (1820), 2 J. & W. 1, at p. 91; 22 R. R. 84.

"It is a good rule of construction that deeds should b construed so as to give effect to the intention of the parties" : *pe* Abbott, C.J., *Evans* v. *Vaughan* (1825), 4 B. & C. 261, at p. 266 3 L. J. (o.s.) K. B. 213; 28 R. R. 250.

Expressed intention.

"The question in this and other cases of construction of writte instruments is, not what was the intention of the parties, bu what is the meaning of the words they have used" : *per* Lor Denman, C.J., *Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651, a p. 663; 3 L. J. K. B. 28; 39 R. R. 603.

Whole deed to be considered.

"It is quite true, I am not to conjecture or guess at what migh have been the intention of the parties; but I am to consider th whole instrument, and if there appear a plain intention to giv interest, then, though there should be no express words to tha effect, and this is the case of a deed, yet I am bound to give it tha construction" : *per* Lord St. Leonards, *Clayton* v. *Glengall* (1841) 1 Dr. & W. 1, at p. 14.

"The general principle—that of construing a deed according t the intention, where by any possibility you can do so—is clea enough" : *per* Lord Truro, *Mill* v. *Hill* (1852), 3 H. L. C. 828 at p. 850; 88 R. R. 356.

"I adopt the observations of Alexander, C.B., in *Colmore* v *Tyndall* ((1828), 2 Younge & J. 605, at p. 622; 31 R. R. 637) that this Court deals with a deed according to the clear intentio of the parties appearing in the four corners of the deed itself. I the Court sees an intention clearly and distinctly established by i it has no difficulty in carrying that into effect; subject of cours to any rules of law that may be applicable to it, but only qualifie to that extent" : *per* Sir J. Romilly, M.R., *Beaumont* v. *Marq of Salisbury* (1854), 19 Beav. 198, at p. 206; 24 L. J. Ch. 94; 10 R. R. 115.

Rules of law.

Express words.

"The rule of construction . . . has been to adhere as rigidly a possible to the express words" : *per* Lord Cranworth, C., *Grey* v

Pearson (1857), 6 H. L. C. 61, at p. 78; 26 L. J. Ch. 473; 108 R. R. 19.

"The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction, and the disregard of which often leads to erroneous conclusions": *per* Lord Wensleydale, *Monypenny* v. *Monypenny* (1861), 9 H. L. C. 114, at p. 146; 31 L. J. Ch. 269; 131 R. R. 72.

"I apprehend it is a sovereign rule in the construction of all written documents to give effect to the intention of the parties as expressed in the instrument itself and to give effect if possible to every word, or at all events to every provision": *per* Byles, J., *Hayne* v. *Cummings* (1864), 16 C. B. (N.S.) 421, at p. 427; 139 R. R. 559.

Meaning of words used.

"I am disposed to follow the rule of construction which was laid down by Lord Denman and Baron Parke. . . . They said that in construing instruments you must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used": *per* Brett, L.J., *Ex p. Chick, re Meredith* (1879), 11 Ch. D. 731, at p. 739.

"One must consider the meaning of the words used, not what one may guess to be the intention of the parties": *per* Jessel, M.R., *Smith* v. *Lucas* (1881), 18 Ch. D. 531, at p. 542.

Deeds failing to take effect in manner intended.

Words capable of more than one construction are to be construed so as to carry into effect the expressed general intention of the parties: and if owing to some rule of law a deed fail to take effect in the manner expressed, it will, if possible, be construed so as to carry into effect the expressed general intention of the parties.

Deed to be good if possible.

In *Throckmerton* v. *Tracy* (1555), 1 Plowd. 145, at p. 160, the following rules were laid down by Staunford, J., for interpreting deeds: "First, that deeds shall be taken most beneficially for the party to whom they are made; secondly, that a deed shall never be void, where the words may be applied to any intent to make it good; and upon this he cited Bracton, who saith, '*Benigne faciendae sunt interpretationes instrumenti, ut res magis valeat quam pereat*,' and in another place he saith, '*in re dubia*.'"

"A deed that is intended and made to one purpose may enure to another, for if it will not take effect [in] that way it is intended, it may take effect another way; [provided it may have that effect consistently with the intention of the parties]. And therefore a

deed made and intended for a release, may amount to a grant of a reversion, an attornment, or a surrender, or *é converso*" : Shep. Touch. 82; *Chester* v. *Willan* (1669), 2 Wms. Saund. 96 a (notes).

"I shall lay down some general rules and maxims of the law, with respect to the construction of deeds. First, it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary. Another maxim is, 'that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible'" : *per* Willes, C.J., *Smith* v. *Packhurst* (1742), 3 Atk. 135, at p. 136; *S. C. sub nom. Parkhurst* v. *Smith*, Willes, 327.

Intention to be effectuated if possible.

"The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention" : *per* Lord Mansfield, C.J., *Goodtitle* d. *Edwards* v. *Bailey* (1777), 2 Cowp. 597, at p. 600. See to the same effect, *per* Dallas, C.J., *Solly* v. *Forbes* (1820), 4 Moo. 448, at p. 463; 22 R. R. 641.

"I conceive that all deeds are to be construed not only strictly according to their words, but so far as is possible, without infringing any rule of law, in such a way as to effectuate the intention of the parties" : *per* Pearson, J., *Hilbers* v. *Parkinson* (1883), 25 Ch. D. 200, at p. 203; 53 L. J. Ch. 194.

Deeds construed as covenant to stand seised;

Deeds of the natures following, not taking effect in the manner in which they were intended to take effect have, where there was relationship between the parties, taken effect as covenants to stand seised :—A deed of feoffment without livery : *Walker* v. *Hall* (1677), 2 Lev. 213; *Thompson* v. *Attfield* (1682), 1 Vern. 40; *Doe* v. *Salkeld* (1755), Willes, 674; *S. C. sub nom. Doe* v. *Purchasers, etc.*, 2 Wils. 22; and even where the feoffee to uses was not, but the *cestui que use* was, a relation : *Thorne* v. *Thorne* (1682), 1 Vern. 141 (see the bill at length in 2 M. & W. 512, n.); *Sleigh* v. *Metham* (1697), Lutw. 242 (Nelson's ed.); *Doe* v. *Davies* (1837), 2 M. & W. 503; 6 L. J. Ex. 176; 46 R. R. 675 (*Hore* v. *Dix* (1660), 1 Sid. 25, cit. 2 M. & W. 507, is *contra*, but is overruled 2 Wils. 79; and *Samon* v. *Jones* (1690), 2 Vent. 318, which was a decision of the House of Lords to the same effect as *Hore* v. *Dix*, was disapproved by Willes, C.J., in *Doe* v. *Salkeld* (*supra*), at p. 679.

ıd in *Roe* v. *Tranmarr* (1758), Willes, 682, and by Parke, B., . *Doe* v. *Davies* (*supra*), at p. 517); a deed purporting to grant a eehold *in futuro* : *Harrison* v. *Austin* (1688), Carth. 38; Comb. 28 (from the report in Carth. it appears that the case was comromised); *Rigden* v. *Vallier* (1751), 2 Ves. Sen. 253; 3 Atk. 731; *oe* v. *Prince* (1851), 20 L. J. C. P. 223; 90 R. R. 796; a elease founded on a lease, but void as purporting to grant a eehold *in futuro* : *Roe* v. *Tranmer* (1758), 2 Wils. 75; *S. C. sub om. Roe* v. *Tranmarr*, Willes, 682; a deed of grant : *Sanders* v. *avile* (1657), cited 3 Lev. 372, and Sir T. Raymond, 48; *Osman* . *Sheafe* (1693), 3 Lev. 370; *S. C. sub nom. Osmere* v. *Sheafe*, utw. 378 (Nelson's ed.); Carth. 307; *Doe* v. *Woodroffe* (1849), 0 M. & W. 608; 15 M. & W. 769; 2 H. L. C. 811; 18 L. J. Ex. 98; 81 R. R. 401; a covenant that "he giveth and settleth" : *oe* v. *Williams* (1833), 5 B. & Ad. 783; 39 R. R. 645; "that if e die without issue he does give and grant" : *Coltman* v. *Senhouse* 1678), 2 Lev. 225; Pollexf. 523; *S. C. sub nom. Coultman* v. *enhouse*, T. Jones, 105; *sub nom. Colton* v. *Senhouse*, 2 Show. 1, ca. 7; a bargain and sale void for want of a pecuniary conideration : *Tebbe* v. *Popplewell* (1599), 2 Roll. Abr. 786, pl. 1; *Vats* v. *Dix* (1649), Styl. 204; *Crossing* v. *Scudamore* (1673), Lev. 9; 1 Mod. 175; 1 Vent. 137; *S. C. sub nom. Crossing* v. *kidmore*, 2 Keb. 754, 784; *Baker* v. *Lade* (1690), 3 Lev. 291; arth. 253; *S. C. sub nom. Barker* v. *Lade*, 4 Mod. 149; *sub nom. ade* v. *Baker*, 2 Vent. 145; *sub nom. Baker* v. *Lane*, Skin. 315; a elease founded on a lease for a year that was lost : *Brown* v. *Jones* 1744), 1 Atk. 188, at p. 191; a surrender void by reason of an ıtervening estate : *Doe* v. *Pickard* (1797), *per* Lord Kenyon, cited Wms. Saund. 236 f, n.; a conveyance made in consideration of n intended marriage, which could not operate as a bargain and ıle, because there was no pecuniary consideration, nor as a release, ecause there was no lease for a year, nor as a confirmation, ecause neither of the grantees was in possession, nor as a feoffment, ecause there was no livery : *Doe* v. *Salkeld* (*supra*).

Deeds of the natures following, not taking effect in the manner ı which they were intended, have taken effect as grants at common .w :—A grant of a reversion has been effected by a deed of offment, which could not operate as a feoffment for want of very : 2 Roll. Ab. 56, pl. 1; *Knotsford* v. *Eedes* (1599), *ibid.*, l. 2; *Lucy* v. *Englefield* (1616), *ibid.*, pl. 3; *Doe* v. *Cole* (1827), B. & C. 243; 1 Man. & Ry. 33; by a bargain and sale void for ant of enrolment : *Adams* v. *Steer* (1609), Cro. Jac. 210; *Nash* . *Ash* (1862), 1 Hurl. & Colt. 160; 32 L. J. Ex. 165; 130 R. R. 38; by a bargain and sale enrolled, but incapable of carrying out ıe intention of the parties by reason of the non-execution of the

as grant at common law;

uses declared thereby : *Haggerston* v. *Hanbury* (1826), 5 B. & C. 101; 7 D. & R. 723; 4 L. J. (o.s.) K. B. 269; 29 R. R. 176, overruling *Denton* v. *Fettiplace* (1587), cit. Cro. Jac. 210; by a release void as creating a freehold *in futuro* : *Goodtitle* v. *Bailey* (1777), 2 Cowp. 597; by an appointment void by reason of the non-existence of the power : *Shove* v. *Pincke* (1793), 5 T. R. 124; and see *Perry* v. *Watts* (1842), 3 Man. & Gr. 775.

Where the donee of a power of appointment "*limited and appointed*" by deed, not only the lands the subject of the power, but also other lands, it was held that the words "*limit and appoint*" operated as a grant of the latter lands : *Macandrew* v. *Gallagher* (1874), Ir. R. 8 Eq. 490.

A grant of an easement or profit *à prendre* may be effected by articles of agreement under seal : *Holms* v. *Seller* (1691), 3 Lev. 305; or by a covenant : *Le Countee de Huntington* v. *Le Seigneur Mountjoy* (1582), Moo. 174; 1 And. 307, ca. cccxvii; *S. C. sub nom. Lord Mountjoye and the Earl of Huntington's Case*, Godb. 17; *sub nom. Earl of Huntington and Lord Mountjoye's Case*, 4 Leon. 147; *Northam* v. *Hurley* (1853), 1 El. & B. 665; 22 L. J. Q. B. 183; 93 R. R. 329; *Rowbotham* v. *Wilson* (1860), 8 H. L. C. 348, at p. 362; 30 L. J. Q. B. 49; 125 R. R. 192.

as release of land; A release has been effected by a deed which could not take effect as a feoffment for want of livery, the want of livery being supplied by the possession of a tenant : *Rees* v. *Lloyd* (1811), Wightw. 123; by a grant, by one joint tenant to another : *Chester* v. *Willan* (1669), 2 Wms. Saund. 96 a; *S. C. sub nom. Chester* v. *Wilson*, 1 Vent. 78; *sub nom. Chester* v. *Willand*, 2 Keb. 641; *sub nom. Chester* v. *Willon*, 1 Sidf. 452; and by one co-parcener to another : Y. B. 10 Edw. 4 (1470), 3 b.

as release of services; A release of services has been effected by a confirmation to a tenant of the customary estate freed, etc., from all services except etc. : *Doe* v. *Huntingdon* (1803), 4 East, 271.

as release of debt, etc.; A covenant not to sue on a bond is a release, except where the covenant is not to sue for a certain time : *Deux* v. *Jeffries* (1591), Cro. Eliz. 352; *Ayloffe* v. *Scrimpshire* (1689), Carth. 63; *S. C. sub nom. Ayliff* v. *Scrimshire*, Holt, 619; *Searville* v. *Edwards* (1691), cited 1 Ld. Raym. 420; *Lacy* v. *Kinnaston* (1701), Holt, 178; 3 Salk. 298; *S. C. sub nom. Lacy* v. *Kynaston*, 2 Salk. 575; 1 Mod. 415 and 548; Holt, 218; *sub nom. Lacy* v. *Kinaston*, 1 Ld. Raym. 688; *sub nom. Clayton* v. *Kynaston*, 2 Salk. 573; 1 Mod. 221; *Wilson* v. *Braddyll* (1854), 9 Exch. 718; 23 L. J. Ex. 227; 96 R. R. 938.

as release of power; A covenant not to exercise a power operates as a release of the power, whether general : *Isaac* v. *Hughes* (1870), L. R. 9 Eq. 191; 39 L. J. Ch. 379; or special : *Scrope* v. *Offley* (1740), 1 Br. P. C.

3; *Green* v. *Green* (1845), 2 Jo. & Lat. 529; 69 R. R. 364; *Re ambers* (1847), 11 Ir. Eq. 518; *Hurst* v. *Hurst* (1852), 16 Beav. 2; 22 L. J. Ch. 538; 96 R. R. 179; *Davies* v. *Huguenin* (1863), H. & M. 730; 32 L. J. Ch. 417; 136 R. R. 319; and whether ercisable by will only: *Re Chambers* (*supra*); *Davies* v. *uguenin* (*supra*); *Isaac* v. *Hughes* (*supra*); or by deed or will: *een* v. *Green* (*supra*); or by deed only: *Scrope* v. *Offley* (*supra*); *urst* v. *Hurst* (*supra*) (*a*).

A father by indenture enrolled, in consideration of his natural ection for his son, bargained and sold, gave, granted, and nfirmed the land to him and his heirs. *Held*, that as the son s in possession it might operate by way of confirmation: *Osborn Churchman* (1607), Cro. Jac. 127. as confirmation;

"In case when a freehold or inheritance shall pass by deed dented and enrolled, it need not have the precise words of rgain and sale, but words equipollent or which do tantamount, e sufficient (2nd Inst. 672); as if a man covenants in consideration money to stand seised to the use of his son in fee; if the deed be rolled, it is a good bargain and sale, and yet there are not any rds of bargain and sale, but they amount to so much, as it is ld in *Bedell's Case* ((1608), 7 Rep. 40 b.). So if a man for money ens and grants land to one and his heirs, or in tail, or for life, deed indented and enrolled, it amounts to a bargain and sale, d the land shall pass without any livery and seisin": *Fox's Case* 610), 8 Rep. 94 a; *S. C. sub nom. Smallman* v. *Powys*, 2 Brownl. G. 291. See also *Taylor* v. *Vale* (1589), Cro. Eliz. 166, where e words were "*dedit et concessit*"; *Grey and Edward's Case* 577), 4 Leon. 110, where the word was "*dedit*." as bargain and sale;

Where A by deed indented conveyed as follows: "I the said A ve given, granted, and confirmed for a certain piece of money," thout any words, "bargain and sell," the habendum was to the ffee with warranty against A and his heirs, and there was a ter of attorney to make livery of seisin; the deed was enrolled thin one month after it was made, subsequently the attorney de livery. *Held*, that it operated as a bargain and sale: *Anon.* 572), 3 Leon. 16.

Charter of feoffment containing words of bargain and sale only, as feoffment;

(*a*) The donee of a special testamentary power of appointment may covenant to exercise the power in such a way as to reduce the share of a particular object w a certain amount: *Re Evered*, [1910] 2 Ch. 147; 79 L. J. Ch. 465. Such venant cannot, however, operate affirmatively as an appointment because that ld amount to an exercise by deed of a power exercisable only by will: *Re red* (*supra*) overruling on this point *Davies* v. *Huguenin* (*supra*). And a nant by the donee of a special testamentary power of appointment to appoint will in a particular way and not to revoke or alter the will in that respect no legal operation: *Re Cooke*, [1922] 1 Ch. 292; 91 L. J. Ch. 273, distinhing *Re Evered* (*supra*).

followed by livery, operated as a feoffment: *Benicombe an Parker's Case* (1584), 1 Leon. 25.

as uses of fine;

The uses of a fine may be declared by a bargain and sale no enrolled, or a feoffment without livery: *per* Holt, C.J., *Jones* v *Morley* (1698), 1 Ld. Raym. 288, at p. 291; 12 Mod. 159, at p. 163

New Law.

The Statute of Uses has been repealed, and the methods o conveying lands and any interest therein by livery, or livery an seisin, or by feoffment, or by bargain and sale have been abolishe by the Law of Property Act, 1925.

as assignment;

Covenant to transfer a specific part of a sum of money o mortgage within three months after death and to pay interest i the meantime, operated as an assignment: *Brownlow* v. *Earl o Meath* (1840), 2 Ir. Eq. Rep. 383; 2 Dr. & Wal. 674.

as lease;

"Albeit the most usual and proper [mode of] making of a leas is by the words demise, grant, and to farm let, and with a *habendum* for life or years, yet a lease may be made by othe words; for whatsoever word will amount to a grant will amoun to a lease. And therefore a lease may be made by the word giv betake, or the like. The word *locavit* [hired] also is a good word And the use in the Exchequer is to make leases by the wor *committimus*, which is a good word to make a lease (either by th Crown or a common person: Co. Litt. 45 b). And if A do bu grant and covenant with B that B shall enjoy such a piece of lan for twenty years, this is a good lease for twenty years. So if A promise to B to suffer him to enjoy such a piece of land for twent years this is a good lease for twenty years. So if A license B to enjoy such a piece of land for twenty years; this is a good leas for twenty years": Shep. Touch. 271, 272; see also *Glenwoo Lumber Co.* v. *Phillips*, [1904] A. C. 405; 73 L. J. P. C. 62.

Accordingly, a lease has been created by a covenant with a ma that he should enjoy the land for a certain time: 1 Roll. Ab. 847 848; *Harrington* v. *Wise* (1597), Cro. Eliz. 486; Noy, 57; *S. C sub nom. Harrington* v. *Wyes*, Moo. 459; *Whitlock* v. *Horto* (1606), Cro. Jac. 91; *S. C. sub nom. Whitlock* v. *Chartwell*, Noy 14; *Lady Montague's Case* (1612), Cro. Jac. 301; *Tisdale* v. *Esse* (1615), Hob. 34; Moo. 861; 3 Buls. 204; 1 Roll. Rep. 397; *Ponesle* v. *Blackman* (1620), Bridg. 12; *Drake* v. *Munday* (1630), Cro. Ca 207; W. Jo. 231; *Richards* v. *Sely* (1676), 2 Mod. 79; *S. C sub nom. Richards* v. *Ceely*, 3 Keb. 638; *per* Mansfield, C.J. *Wright* v. *Cartwright* (1757), 1 Burr. 283; *Doe* v. *Ashburne* (1793), 5 T. R. 163 (*Alderes* v. *Wray* (1619), 2 Roll. Rep. 121, *contra*); by a mere licence to occupy for a certain time: Y. B 5 Hen. 7 (1489), 1; Bro. Ab. tit. Lease, 30; *Hall* v. *Seabrigh* (1669), 1 Mod. 14; 2 Keb. 561; 1 Sid. 428; *Anon.* (Ca. 51) (1705) 11 Mod. 42; *Right* v. *Proctor* (1768), 4 Burr. 2208; by a covenan

stand seised: *Right* v. *Thomas* (1763), 3 Burr. 1441, 1446; *N.* Bl. 446; by a covenant to pay rent followed by entry: *bley* v. *Hepworth* (1690), 12 Mod. 1; 3 Salk. 108. But see *ylor* v. *Caldwell* (1863), 3 B. & S. 825; 32 L. J. Q. B. 164; *ncock* v. *Austin* (1863), 14 C. B. (N.S.) 634; 32 L. J. C. P. 252. Woodfall, Landlord and Tenant (21st ed.), pp. 154—164.

But a lease is not created by a covenant with a man that a anger shall enjoy land for a certain term: *Littleton and Pernes'* *se* (1587), 1 Leon. 136; *Porry* v. *Allen* (1589), Cro. Eliz. 173; *C. sub nom. Perryn* v. *Allen*, Owen, 97; *Green* v. *Edwards* 89), Cro. Eliz. 216; 1 And. 258; 1 Leon. 218; Moo. 297; but *per* Mansfield, C.J., *Wright* v. *Cartwright* (*supra*). *contra* as to lease;

A covenant by the tithe-owner with the land-owner not to take nes for a certain time was held not to amount to a lease of m: *Brewer* v. *Hill* (1794), 2 Anst. 413; 3 R. R. 596.

The cases as to when an agreement for a lease amounts to a se are collected in Woodfall, c. 4, s. 1 (21st ed., p. 111); the st modern are *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; 52 J. Ch. 2, and *Allhusen* v. *Brooking* (1884), 26 Ch. D. 559; 53 J. Ch. 520; *Swain* v. *Ayres* (1888), 21 Q. B. D. 289; 57 L. J. B. 428; *Lowther* v. *Heaver* (1889), 41 Ch. D. 248; 58 L. J. Ch. 2; *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608; 70 J. Ch. 814; *Rickett* v. *Green*, [1910] 1 K. B. 253; 79 L. J. B. 193. See also *Gray* v. *Spyer*, [1922] 2 Ch. 22; 91 L. J. Ch. 2. As to the position of an assignee of such an agreement, see *rchase* v. *Lichfield Brewery Co.*, [1915] 1 K. B. 184; 84 L. J. B. 742. as agreement for lease;

The words "grant, bargain, sell, and demise" were held to erate by way of assignment of a term in *Marshall* v. *Frank* 17), Gilb. Eq. R. 143; *Beaumont* v. *Marq. of Salisbury* (1854), Beav. 198; 24 L. J. Ch. 94; 105 R. R. 115. as assignment of term;

Where a term had become merged in the inheritance, and the ner of the inheritance "granted, bargained, sold, assigned and over" the premises for the residue of the original term, it was d that there was a resuscitation of the term by the words *grant*, *gain*, and *sell*, as well as *assign*; *Denn* d. *Wilkins* v. *Kemeys* 08), 9 East, 366; 9 R. R. 581; *Cottee* v. *Richardson* (1851), Ex. 143; 86 R. R. 585; but Shadwell, V.-C., held a contrary nion in *Law* v. *Urlwin* (1848), 16 Sim. 377 (where the operative rd was "assign" only) (*b*).

(*b*) But see the adverse criticisms on this decision in Sugden's Vendors and chasers (14th ed.), p. 620, § 15. As to the question of merger depending intention see the decision of the Court of Appeal in *Re Fletcher*, [1917] h. 339; 86 L. J. Ch. 317, where in the same mortgage deed the term was gned and the freehold reversion granted by the mortgagors in whom both rsion and term had become vested; and see also *Thellusson* v. *Liddard*,

as appointment;

A power of appointment among children has been held to l exercised by a feoffment : *Daniel* v. *Ubley* (1626), W. Jo. 137; *S.* *sub nom. Daniel* v. *Upton*, Noy, 80; *sub nom. Daniel* v. *Upl* Latch, 134; *sub nom. Danyel* v. *Ubley*, Bendl. 178; by a lease ar release : *Tomlinson* v. *Dighton* (1711), 1 P. Wms. 149; 2 E Ca. Ab. 309, p. 13; *S. C. sub nom. Thomlinson* v. *Dighton*, 10 Mo 31 and 71; by a recital : *Wilson* v. *Piggott* (1794), 2 Ves. Jr. 35 355; 2 R. R. 246; and a power of jointuring has been held to l exercised by a covenant to stand seised : *Stapleton's Case*, cited Vent. 228; *Lady Hastings' Case*, cited 3 Keb. 511; and by lea and release : *Dyer* v. *Awister* (1706), cited 1 P. Wms. 165; *S.* *sub nom. Gier* v. *Ossiter*, cited 10 Mod. 34; a general power appointment by a recital : *Poulson* v. *Wellington* (1729), 2 P. Wm 533; 2 Eq. Ca. Ab. 131, pl. 3; by a lease and release : *Snape* *Turton* (1637), Cro. Car. 472, W. Jones, 392; *contra*, *Bramh* v. *Hall* (1764), Amb. 467; 2 Eden, 220; and a power of appointi new trustees by a recital in a lease to which the donee was a party *Re Farnell's S. E.* (1886), 33 Ch. D. 599.

as execution of powers.

On the same principle, deeds not referring to a power ha operation as an execution of it.

An instrument, in order to operate as an execution of a powe "must either refer to the power, or to the property subject to t power, or it must affect to deal with some property in gener terms, not defining it, under such circumstances that it cann have effect except upon the property comprised in the power; a for instance, where a testator gives all his real estate, having real estate of his own, but having only a power over real estate' *per* Wood, V.-C., *Brodrick* v. *Brown* (1855), 1 K. & J. 328, p. 332; 103 R. R. 103.

Statutory powers.

The same rule applies to statutory powers, as, for instance, the power of leasing given by the Settled Land Act, 188 *Mogridge* v. *Clapp*, [1892] 3 Ch. 382; 61 L. J. Ch. 534; *Re Danie* [1912] 2 Ch. 90; 81 L. J. Ch. 509.

The cases are collected in Sugden on Powers, 289 (8th ed. Farwell on Powers (3rd ed.), p. 201; it is unnecessary to discu them at length, as most of them arise on wills. *Cowlishow* *Hardy* (1857), 25 B. 169; 119 R. R. 375, is however a case on deed.

Where interest and power.

Where the donee of a power has also an interest, and the de executed by him refers to the power, it operates as an execution

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[1900] 2 Ch. 635; 69 L. J. Ch. 673; *Capital and Counties Bank* v. *Rhod* [1903] 1 Ch. 631; 72 L. J. Ch. 336. It would seem that even if merger h taken place, an assignment by the reversioner of the property for the residue the term would by virtue of section 63 of the Conveyancing Act, 1881 (n section 63, L. P. Act, 1925), be good as against him.

power; otherwise, it operates on his interest. But where the d cannot take effect on his interest, it will operate as an execu- of the power, even if no reference be made to the power: *Ed. Clere's Case* (1602), 6 Rep. 17 b; *S. C. sub nom. Parker* v. *Ed. Clere*, Moo. 567; *sub nom. Sir Ed. Clere* v. *Parker* (1602), . Eliz. 877; *sub nom. Sir Ed. Clere* v. *Parker* (1604), Cro. Jac. *Colt and Glover* v. *Bp. of Coventry and Lichfield* (1612), b. 140, at p. 160; but see *Browne* v. *Taylor* (1626), Cro. Car. Sugden on Powers, 343 (8th ed.); Farwell, Pow. (3rd ed.)

Powers of revocation limited to be exercised by deed have been d to be well exercised, by an indenture executed in accordance h the requirements of the power and containing a covenant to y a fine to other uses and by fine levied accordingly: *Wigson Garret* (1675), 2 Lev. 149; by a fine followed by an indenture cuted in accordance with the requirements and declaring the s of the fine: *Herring* v. *Brown* (1688), Carth. 22; 2 Show. B. 185; Skin. 35, 52 and 184; reversing 1 Vent. 368 and 371, d Comb. 11. Powers of revocation.

There is, however, an important exception to this rule for—

> A voluntary settlement, intended to take effect by transfer, cannot be upheld as a declaration of trust, if the transfer be not completed. Voluntary settlements.

"If the settlement is intended to be effectuated by one of the des to which I have referred, the Court will not give effect to it applying another of those modes. If it is intended to take effect transfer, the Court will not hold the intended transfer to operate a declaration of trust": *per* Turner, L.J., *Milroy* v. *Lord* (1862), . F. & J. 264, at p. 274; 31 L. J. Ch. 798; 135 R. R. 135; cited *Carter* v. *Hungerford*, [1917] 1 Ch. 260, at p. 271; 86 L. J. Ch. ; and approved in *Macedo* v. *Stroud*, [1922] 2 A. C. 330, at 338; 91 L. J. P. C. 222; *Antrobus* v. *Smith* (1806), 12 Ves. 39; R. R. 278; *Dillon* v. *Coppin* (1839), 4 M. & C. 647; *Searle* v. *w* (1846), 15 Sim. 95; 15 L. J. Ch. 187; 74 R. R. 27; *Bridge* v. *dge* (1852), 16 B. 315; 22 L. J. Ch. 189; 96 R. R. 144; *Wood- d* v. *Charnley* (1860), 28 B. 96; 126 R. R. 39; *Warriner* v. *Rogers* 73), L. R. 16 Eq. 340; 42 L. J. Ch. 581; *Richards* v. *Delbridge* 74), L. R. 18 Eq. 11; 43 L. J. Ch. 459; *Moore* v. *Moore* (1874), R. 18 Eq. 474; 43 L. J. Ch. 617; *Heartley* v. *Nicholson* (1874), R. 19 Eq. 233; 44 L. J. Ch. 277; *Lee* v. *Magrath* (1882), 10 R. Ir. 313; *Re Shield* (1885), 53 L. T. 5; *Re Williams* (a con- ional authority to receive policy moneys after assured's death), 17] 1 Ch. 1; 86 L. J. Ch. 36.

Election of grantee.

> "When a deed may enure to divers purpos
> [both taking effect on delivery] he to whom th
> deed is made shall have election which way to tak
> it, and he may take it that way as shall be most fo
> his advantage": Shep. Touch. 83.

The rule is stated in the Touchstone without the words
brackets, but it requires the insertion of those words, because, if
deed operates in one manner on delivery, and can only operate
another on a further act being done, it must operate in the form
way and the grantee has no election: *Anon.* (1572), 3 Leon. 1
Haggerston v. *Hanbury* (1826), 5 B. & C. 501; 29 R. R. 176.

"Some words are large and have a general extent, and son
have a proper and particular application. The former sort ma
contain the latter; as *dedi* or *concessi* may amount to a grant,
feoffment, a gift, a lease, a release, a confirmation, a surrender, etc
and it is in the election of the party to use which of these purpos
he will. . . . And he to whom such a deed comprehending *ded*
etc., is made, may plead it as a grant, as a release, or as a co
firmation, at his election": Co. Litt. 301 b.

Sir R. H., seised of a manor, part in demesne, part in copyhol
part in leasehold for years, in consideration of a sum of money, b
deed, "demised, granted, bargained, and sold" it for a term
years to commence from his death. *Held*, that the grantees mig
elect to take by demise at common law, or by bargain and sa
under the statute: *Heyward's Case* (1595), 2 Rep. 35 a; to the san
effect are *Lennard's Case* (1585), 2 Leon. 192; *S. C. sub nom*
Leonard's Case, 3 Leon. 128; and *Darrell* v. *Gunter* (1629), S
W. Jones, 206, where the words were "demise, grant, and to far
let."

The King having rent of a manor, of which A and his wi
were jointly seised, for valuable consideration, "gave and grante
remitted, released, and renounced" the rent to the husband an
his heirs. *Held*, that the husband might use it as a grant of th
rent or as a release of it, at his election: *Anon.* (1572), Dy. 319
pl. 16.

Deed readable in two ways, one unlawful.

If a deed can be read in two ways, one being lawful and the oth
unlawful, it is read so as to be lawful: Co. Litt. 42 a.

CHAPTER IV.

WORDS TO BE CONSTRUED IN LITERAL MEANING.

ords to be taken in Literal Meaning: Technical Words: Evidence Admissible to determine Literal Meaning: Evidence of Circumstances: Foreign Language: Dictionary: Illegible Documents: Words Defined by Statute: Technical Legal Terms: Practice of Conveyancers: Mercantile Contracts.

THE next most important rule for the construction of deeds is—

Words to be taken in literal meaning.

> When the words used in a deed are in their literal meaning unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words.

What is literal meaning.

By "*literal meaning*" is intended not necessarily the primary ymological or dictionary meaning, but (1) the meaning usually ixed to the words at the time of the execution of the deed, by rsons of the class to which the parties belonged; or (2) the eaning in which the words must have been used by the parties, ving regard to their circumstances at the time of execution; or) the meaning which it can be conclusively shown that the parties ere in the habit of affixing to the words.

"I have been long and deeply impressed with the wisdom of e rule, now, I believe, universally adopted, at least in the Courts Law in Westminster Hall, that in construing wills, and indeed atutes, and all written instruments, the grammatical and ordinary ase of the words is to be adhered to, unless that would lead to me absurdity, or some repugnance or inconsistency with the rest the instrument, in which case the grammatical and ordinary sense the words may be modified, so as to avoid that absurdity and onsistency, but no further": *per* Jessel, M.R., *Re Levy, ex p. alton* (1881), 17 Ch. D. 746, at p. 751; 50 L. J. Ch. 657; quoting rd Wensleydale in *Grey* v. *Pearson* (1857), 6 H. L. C. 61. And *Hill* v. *East and West India Dock Co.* (1884), 9 A. C. 448, at

p. 464; 53 L. J. Ch. 842; where Lord Bramwell (dissenting) com ments upon the so-called "golden rule" enunciated above.

"All these refinements and nice distinctions of words appear t me to be inconsistent with the modern view—which is I think i accordance with reason and common sense, that, whatever th instrument, it must receive a construction according to the plai meaning of the words and sentences therein contained. But agree that you must look at the whole instrument, and, inasmuc as there may be inaccuracy and inconsistency, you must, if yo can, ascertain what is the meaning of the instrument taken as whole in order to give effect, if it be possible to do so, to th intention of the framer of it. But it appears to me to be arguin in a vicious circle to begin by assuming an intention apa from the language of the instrument itself, and having made tha fallacious assumption to bend the language in favour of th assumption so made": *per* Halsbury, L.C., in *Leader* v. *Duffe* (1888), 13 A. C. 294, at p. 301; 58 L. J. P. C. 13, cited in *R Beresford's Settlement*, [1914] 1 Ir. R. Ch. 222, at p. 233.

"In the construction of deeds, ordinary words ought to be give their plain and ordinary meaning": *per* Swinfen Eady, L.J., i *Beard* v. *Moira Colliery Co.*, [1915] 1 Ch. 257, at p. 268; 84 L. J Ch. 155; and see *Davies* v. *Powell Duffryn Steam Coal Co.*, [1917 1 Ch. 488, at p. 504; 86 L. J. Ch. 298; *Enlayde, Ltd.* v. *Robert* [1917] 1 Ch. 109, at p. 118; 86 L. J. Ch. 149; where Proposition 1 of Wigram's Extrinsic Evidence (3rd ed., p. 17; 5th ed., p. 18 is applied to the construction of documents other than wills. C *Upjohn* v. *Hitchens*, [1918] 2 K. B. 48; 87 L. J. K. B. 1205.

In construing instruments in writing "the object is to see wha is the intention expressed by the words used . . . the meaning words varies according to the circumstances with respect to whic they were used." See *River Wear Commissioners* v. *Adamso* (1877), 2 App. Cas. 743, at p. 763; 47 L. J. Q. B. 193; *Butterle Co., Ltd.* v. *New Hucknall Colliery, Ltd.*, [1910] A. C. 381, 382 79 L. J. Ch. 411; *Davies* v. *Powell Duffryn Steam Coal Co.* (*supra* [1917] 1 Ch., at p. 497.

Technical words.

The literal meaning of technical words in a deed relating the art or science in which such words are used is their technic meaning.

Evidence admissible.

Extrinsic evidence is admissible for the purpos of determining the literal meaning of the word used and for no other purpose.

Hence evidence is admissible to show who the parties to th instrument are, the circumstances under which the instrument w

ecuted, and the meaning which they were in the habit of affixing any words used.

"As words and phrases of speech are to be expounded and nstrued as they are generally understood, so it is likewise in rticular places; and therefore, if I covenant to convey to another acre of land in *Cornwall*, the common acceptation of the word cre' there amounts to as much as a hundred of other counties, 'a perch' in *Staffordshire* is as much as twenty perches in some her places, therefore such words must be governed by the common d known acceptation of the people": *per Curiam*, *Barksdale* v. *organ* (1693), 4 Mod. 185, at p. 186.

A written instrument "is to be construed according to its sense d meaning, as collected, in the first place, from the terms used it, which terms are themselves to be understood in their plain, dinary, and popular sense, unless they have generally in respect the subject-matter, as by the known usage of trade, or the like, quired a peculiar sense distinct from the popular sense of the me words; or unless the context evidently points out that they ust in the particular instance, and in order to effectuate the mediate intention of the parties to that contract, be under-ood in some other special and peculiar sense": *per* Lord Ellen-rough, C.J., *Robertson* v. *French* (1803), 4 East, 130, at p. 135; R. R. 535.

Trade terms.

Context.

"It is true that Courts ought to expound deeds as well as wills cording to the intention of the maker, but it has never been id that a Court is so to frame or alter a deed as may best ectuate the maker's intention. The party is left to execute his n purpose in his own way. He may execute it unskilfully and sufficiently, but if the dispositions which he makes are clear and ambiguous the Court cannot alter them merely because they e ineffectual to the attainment of the proposed end": *per* ant, M.R., *Cholmondeley* v. *Clinton* (1817), 2 Mer. 171, at 343; 16 R. R. 167.

Evidence of circumstances.

"This is the first time I have ever known it doubted, whether e estate, and interest, and powers of the settlor over the estate was settling was admissible in proof. I am not offering clarations of what the party said she meant, I am not con-uing a legal instrument by the acts of the parties, or by their derstanding upon it [as in *Cooke* v. *Booth* ((1778), Cowper,) (*a*)]; but, by showing the circumstances and situation of the ty, and the estates and interest she had at the time, I am bling the House to judge what, in legal construction, was her aning. And I am not aware that there is any legal authority to

(*a*) Since discredited and now not good law—see *Watcham* v. *East Africa ectorate*, [1919] A. C. 533, at p. 543; 87 L. J. P. C. 150.

exclude the evidence of such circumstances and situation. . . If a man makes any deed or will, have I not a right to know wha estate he had at the time he made such deed or will; and does no the construction vary, in some cases, according to the estate? If grant a man an estate for life, without saying whether for his lif or mine, is not evidence admissible to show what interest I ha in the premises? For if I was tenant in fee, he will take an estat for his own life; if I was tenant in tail or for life only, he will tak for mine" (Co. Litt. 42, a): *per* Bayley, J., *Smith* v. *Doe* (1821) 2 Brod. & Bing. 473, at p. 550; 22 R. R. 19. In that case settlement contained a power to grant leases, "so as there b contained in every such lease a power of re-entry for non-paymen of the rent thereby to be reserved"; the power of re-entry inserte into the lease was in case the rent should be unpaid for fiftee days, and there should not be sufficient distress, or in certain othe events. *Held*, that evidence was admissible as to the form of th power of re-entry inserted in leases of the estate prior to th settlement: see *per* Lord Eldon, L.C., *S. C.*, 2 Brod. & Bing., a pp. 602 *et seq.*; 3 Bligh, at pp. 449 *et seq.*

Expressed intention.

"It is unquestionable that the object of all exposition of writte instruments must be to ascertain the expressed meaning or inten tion of the writer, the expressed meaning being equivalent to th intention; and I believe the authorities to be numerous and clea (too numerous and clear to make it convenient or necessary to cit them) that, where language is used in a deed which in its primar meaning is unambiguous, and in which that meaning is not exclude by the context, and is sensible with reference to the extrinsi circumstances in which the writer was placed at the time of writing such primary meaning must be taken, conclusively, to be that i which the writer used it; such meaning, in that case, conclusivel states the writer's intention, and no evidence is receivable to sho that in fact the writer used it in any other sense, or had any othe intention. This rule, as I state it, requires perhaps two explanator observations; the first, that if the language be technical or scientific and it is used in a matter relating to the art or science to whic it belongs, its technical or scientific must be considered its primar meaning; the second, that by 'sensible with reference to the extrinsi circumstances' is not meant that the extrinsic circumstances mak it more or less reasonable or probable is (*sic; quære* that the primar meaning is) what the writer should have intended; it is enough those circumstances do not exclude it, that is, deprive the word of all reasonable application according to such primary meaning (*per* Coleridge, J., *infra*).

Technical words.

Unexpressed intentions.

"This rule thus explained, implies that it is not allowable in th case supposed to adduce any evidence, however strong, to prove a

nexpressed intention varying from that which the words used nport. This may be open no doubt to the remark, that, although e profess to be exploring the intention of the writer, we may be d in many cases to decide contrary to what can scarcely be doubted o have been the intention, rejecting evidence which may be most atisfactory in the particular instance to prove it. The answer , that interpreters have to deal with the written expression of ne writer's intention, and Courts of Law to carry into effect what e has written, not what it may be surmised, on however probable rounds, that he intended only to have written. . . . But in roportion as we are removed from the period in which an author rites, we become less certain of the meaning of the words he ses; we are not sure that at that period the primary meaning f the words was the same as now, for by the primary is not neant the etymological, but that which the ordinary usage of ociety affixes to it. We are also equally uncertain whether at that eriod the words did not bear a technical or conventional sense; nd whether they were not so used by the writer": *per* Coleidge, J., *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at pp. 525, 527; 7 R. R. 2.

"I apprehend that there are two descriptions of evidence (the nly two which bear upon the subject of the present inquiry), and hich are clearly admissible in every case for the purpose of nabling a Court to construe any written instrument, and to apply practically. In the first place, there is no doubt that not only here the language of the instrument is such as the Court does not nderstand, it is competent to receive evidence of the proper eaning of that language, as when it is written in a foreign tongue; nt it is also competent, where technical words or peculiar terms, indeed any expressions are used, which at the time the instruent was written, had acquired an appropriate meaning, either nerally or by local usage, or amongst particular classes. The thorities in support of this position are *Att.-Gen.* v. *Castate Glass Co.* (1792), 1 Anst. 39; 3 R. 543; *Goblet* v. *eechey* (1829), 3 Sim. 24; *Smith* v. *Wilson* (1832), 3 B. & Ad. 8; 1 L. J. K. B. 194; 37 R. R. 536; *Richardson* v. *Wilson* 833), 4 B. & Ad. 787; and *Clayton* v. *Gregson* (1836), 5 Ad. & 302; 44 R. R. 427. This description of evidence is admissible, order to enable the Court to understand the meaning of the ords contained in the instrument itself, by themselves, and thout reference to the extrinsic facts on which this instrument intended to operate": *per* Parke, B., *Shore* v. *Wilson* (*supra*) 842), 9 Cl. & F., at p. 555.

Evidence of meaning of foreign language:

Technical words.

"For the purpose of applying the instrument to the facts, and termining what passes by it, and who take an interest under it, a

Evidence as to circumstances.

second description of evidence is admissible, *viz.*, every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. The authorities for this position are also numerous; they are referred to in Vice-Chancellor Wigram's excellent Treatise on the Admission of Extrinsic Evidence, under the Fifth Proposition (p. 53, 3rd ed.; p. 67, 4th ed.; p. 58, 5th ed.). From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written" : *per* Parke, B., *Shore* v. *Wilson* (*supra*), at p. 555; and see *Enlayde, Ltd.* v. *Roberts*, [1917] 1 Ch. 109, at p. 119; 86 L. J. Ch. 149; and *Upjohn* v. *Hitchens*, [1918] 2 K. B. 48; 87 L. J. K. B. 1205.

Context.

"The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it, for the ablest advice might be controlled and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

Common meaning of words.

"The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under

ıe surrounding circumstances, the sense and meaning of the ıngnage may be investigated and ascertained by evidence *dehors* ıe instrument itself; for both reason and common sense agree ıat by no other means can the language of the instrument be made ɔ speak the real mind of the party. Such investigation does of ecessity take place in the interpretation of instruments written in foreign language; in the case of ancient instruments, where, by he lapse of time and change of manners, the words have acquired ı the present age a different meaning from that which they bore hen originally employed; in cases where terms of art or science ccur; in mercantile contracts, which in many instances use a eculiar language employed by those only who are conversant in rade and commerce; and in other instances in which the words, esides their general common meaning, have acquired, by custom r otherwise, a well-known peculiar idiomatic meaning in the articular country in which the party using them was dwelling, or ı the particular society of which he formed a member, and in hich he passed his life. In all these cases evidence is admitted ɔ expound the real meaning of the language used in the instrument, ı order to enable the Court or Judge to construe the instrument, nd to carry such real meaning into effect.

Evidence of meaning.

Ancient documents.

Technical words.

"But whilst evidence is admissible in these instances for the urpose of making the written instrument speak for itself, which ithout such evidence would be either a dead letter, or would use doubtful tongue, or convey a false impression of the meaning of ıe party, I conceive the exception to be strictly limited to cases f the description above given, and to evidence of the nature above etailed; and that in no case whatever is it permitted to explain ıe language of a deed by evidence of the private views, the secret ıtentions, or the known principles of the party to the instrument, hether religious, political, or otherwise, any more than by express arol declarations made by the party himself, which are universally xcluded, for the admitting of such evidence would let in all the ncertainty before adverted to; it would be evidence which in most stances could not be met or countervailed by any of an opposite earing or tendency, and would in effect cause the secret undeclared tention of the party to control and predominate over the open tention expressed in the deed": *per* Tindal, C.J., *Shore* v. *ilson* (*supra*), at p. 565.

Evidence as to intention inadmissible.

"We must apply the ordinary rules of construction. . . . One these rules is that words are to be construed according to their rict and primary acceptation unless from the context of the strument and the intention of the parties to be collected from it ey appear to be used in a different sense, or unless in their strict nse they are incapable of being carried into effect; and subject

Context.

always to the observation that the meaning of a particular word may be shown by parol evidence to be different in some particular place, trade or business from its proper and ordinary acceptation": *Mallan* v. *May* (1844), 13 M. & W. 511, at p. 517; 14 L. J. Ex. 48; 67 R. R. 707. See *Rowett, Leakey & Co.* v. *Scottish Provident Institution*, [1927] 1 Ch. 55; 95 L. J. Ch. 434.

Context.

Circumstances.

Trade terms.

Usage.

Technical words.

Circumstances.

"It is clear that the construction of a written contract, subject to the exceptions mentioned below, is for the Judge (*b*). It is also clear that 'months' denote at law 'lunar months,' unless there is admissible evidence of an intention in the parties using the word to denote 'calendar months.' If the context shows that calendar months were intended, the Judge may adopt that construction (*Lang* v. *Gale* (1813), 1 M. & S. 111; 149 R. R. 817; *R.* v. *Chawton* (1841), 1 Q. B. 247; 10 L. J. M. C. 55; 55 R. R. 246). If the surrounding circumstances, at the time the instrument was made, show that the parties intended to use the word, not in its primary or strict sense, but in some secondary meaning, the Judge may construe it from such circumstances, according to the intention of the parties (*Beckford* v. *Cruttwell* (1832), 1 Moo. & R. 187; *Mallan* v. *May* (*supra*); *Walker* v. *Hunter* (1845), 2 C. B. 324; *Goldshede* v. *Swan* (1847), 1 Exch. 154; 16 L. J. Ex. 284; 74 R. R. 623; Bacon's Maxims, Reg. 10, and the examples there given). If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that particular sense (*Jolly* v. *Young* (1794), 1 Esp. N. P. C. 186; *Smith* v. *Wilson* (1832), 3 B. & Ad. 728; 1 L. J. K. B. 194; 37 R. R. 536; *Grant* v. *Maddox* (1846), 15 M. & W. 737; 16 L. J. Ex. 227; 71 R. R. 815. If the meaning of a word depends upon the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the jury (*Bourne* v. *Gatliff* (1844), 11 Cl. & F. 45; 44 R. R. 723; *Robertson* v. *Jackson* (1845), 2 C. B. 412; 15 L. J. C. P. 28; 69 R. R. 490). Also the jury may have to give the meaning of some technical words": *per* Lord Denman, C.J., *Simpson* v. *Margitson* (1847), 11 Q. B. 23, at p. 31; 17 L. J. Q. B. 81; 75 R. R. 278; *Upjohn* v. *Hitchens*, [1918] 2 K. B. 48; 87 L. J. K. B. 1205.

"The evidence was admissible in this case for the purpose of showing the circumstances in which the party was when making the instrument. You admit it as you admit evidence in construing a will, not to modify the expressions of the will, not to affix a sense upon the will which it does not bear, not to tell you what the meaning of the will is, but to tell you what were the circumstances in which the testator was when he used those expressions, for

(*b*) *Smith* v. *Thompson* (1849), 8 C. B. (o.s.) 44, at p. 56; 18 L. J. C. P. 314; 19 R. R. 401.

e purpose of enabling you to ascertain what meaning he affixed the expressions that he used, and for no other purpose" : *per* ord Brougham, *Drummond* v. *Att.-Gen. for Ireland* (1849), 2 . L. C. 837, at p. 862; 81 R. R. 433.

Usage.

"In construing such an instrument, you may look to the usage see in what sense the words were used at that time; you may ok to contemporaneous documents, as well as to Acts of Parliaent, to see in what sense the words were used in the age in which e deeds were executed (*Shore* v. *Wilson* (*supra*)); but to admit vidence to show the sense in which words were used by particular dividuals, is contrary to sound principle" : *per* Lord Campbell, *id.*, at p. 863.

Circumstances.

"In *Lady Hewley's Case*, *Shore* v. *Wilson* (*supra*), and in e later case from Dublin, *Drummond* v. *Att.-Gen.* ((1842), Dru. & War. 353, and on appeal (*supra*)), parol evidence as received only to enable the Court to understand and construe e deed under which the trusts existed. The great question in e former case was as to what was the sense in which the words godly preachers of Christ's holy gospel' were to be understood the deed creating the trust, and in the latter the question was like manner as to the meaning of the words 'Protestant issenters.' In both these cases the parol evidence was necessary order to enable the Court rightly to understand the deed. ertain words were used which it was necessary to construe, and is could not be done without admitting a great deal of evidence to the state of religious parties at the time when the deeds were amed. For such a purpose the evidence was most reasonable. was like the evidence afforded by a dictionary, which enables to translate a foreign language; or a book of science which gives the meaning of words of art" : *per* Lord Cranworth, *Att.-Gen. Clapham* (1855), 4 De G. M. & G. 591, at p. 627; 24 L. J. Ch. 7; 90 R. R. 491.

Dictionary.

"The will must be in writing, and the only question is, what is e meaning of the words used in that writing. To ascertain which ery part of it must be considered with the help of those surrounding circumstances which are admissible in evidence to explain the ords, and put the Court as nearly as possible in the situation the writer of the instrument" : *per* Lord Wensleydale, *Grey* v. *earson* (1857), 6 H. L. C. 61, at p. 106; 26 L. J. Ch. 473; 108 R. R. 19.

Circumstances.

"That which he has written is to be construed by every part of being taken into consideration according to its grammatical nstruction, and the ordinary acceptation of the words used, with e assistance of such parol evidence of the surrounding circumances as is admissible to place the Court in the position of the

Circumstances.

testator" : *per* Lord Wensleydale, *Roddy* v. *Fitzgerald* (1858), 6 H. L. C. 823, at p. 876; 108 R. R. 327.

"In construing all instruments, you must know what the facts were when the agreement was entered into" : *per* Jessel, M.R., *Cannon* v. *Villars* (1878), 8 Ch. D. 415, at p. 419; 47 L. J. Ch. 597; and see *Van Diemen's Land Co.* v. *Table Cape Marine Board*, [1906] A. C., at p. 98; 75 L. J. P. C. 28.

"In my view the principle upon which words are to be construed in instruments is very plain—where there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical or legal character, it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the Court from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention"; *per* Fry, J., *Holt* v. *Collyer* (1881), 16 Ch. D. 718, at p. 720; 50 L. J. Ch. 311; followed in *Lovell* v. *Christmas* (1911), 103 L. T. 588.

Technical words.

"I agree that here the Court must not shut its eyes or blindfold itself, but must try to put itself, in order to understand this agreement, in the position as near as it can of the parties making the agreement. That is the rule, as I understand, on the construction of every deed or document, whether it be an agreement, a deed or a will : the Court has a right to know, and is bound to know, all the material facts which were known to the parties at the time when the agreement, deed, will, or whatever it may be was entered into or made. That is legitimate in all cases for the purpose of construing a written instrument" : *per* Kay, J., *Hart* v. *Hart* (1881), 18 Ch. D. 670, at p. 692; 50 L. J. Ch. 697. See also *Behn* v. *Burness* (1863), 3 B. & S. 751, at p. 757; 32 L. J. Q. B. 204; 124 R. R. 794; *London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107, at p. 134; 53 L. J. Ch. 1025.

Circumstances.

Similar observations will be found in *Holloway* v. *Holloway* (1800), 5 Ves. 399, at p. 401; 5 R. R. 81; *Sidney* v. *Shelley* (1815), 19 Ves. 352, at p. 366; 14 R. R. 247; *Cholmondeley* v. *Clinton* (1817), 2 Mer. 171, at p. 344; 16 R. R. 167; (1820), 2 J. & W. 1, at pp. 67, 69, 80; *Goldshede* v. *Swan* (1847), 1 Exch. 154; 7 R. R. 623; *Hext* v. *Gill* (1872), L. R. 7 Ch. 699, at p. 705; *Ingle* v. *Buttery* (1878), 3 App. Ca. 552, at p. 577; *Tucker* v. *Linge* (1882), 21 Ch. D. 18, at p. 36; 51 L. J. Ch. 713.

When evidence has been admitted to show the circumstances i

ich the instrument was executed, or the meaning which the rties attached to the words used, it may appear that a word, or scription, used in the deed, was used by the parties thereto with ferent meanings: *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906 here the parties contracted for the purchase of cotton, "to arrive *Peerless*, from Bombay," one party meaning a ship of that me which sailed in October, and the other a ship of that name ich sailed in December); *Richards* v. *North London Ry. Co.* 871), 20 W. R. 194 (where the parties were not agreed as to what s properly included in the description of the parcels). In such ses the parties are not *ad idem*, and there is consequently no ntract.

Where parties not *ad idem*.

"I cannot admit there is any such presumption against ness or even superfluity of expression, in statutes or other itten instruments, as to amount to a rule of interpretation ntrolling what might otherwise be their proper construction. No ubt, when the words admit of it, that interpretation which makes em more officious with respect to the clear and ascertained licy of the statute or purpose of the instrument is (in general) be preferred to that which makes them less so. . . . And I here to an opinion expressed by myself in the House of Lords ore than ten years ago in *Giles* v. *Melsom* ((1873), L. R. 6 L. 24, at pp. 33 and 34; 42 L. J. C. P. 122), which, unless am much deceived, I have also heard in substance expressed great masters of the law, that 'nothing can be more mischievous an the attempt to wrest words from their proper and legal mean-, only because they are superfluous'": *per* Lord Coleridge, C.J., *ugh* v. *Windus* (1884), 12 Q. B. D. 224, at p. 229; 53 L. J. B. 165.

Superfluous words.

It should be added that the Court may refer to a dictionary for purpose of ascertaining the meaning of a word: *Matthew* v. *rchins* (1608), Cro. Jac. 203; *Blandford* v. *Marlborough* (1743), Atk. 542, at p. 545.

Dictionary.

Where the document is written in a foreign language, a nslator may be employed; and where the document is so gible that the Court cannot read it, or written in cypher (*Kell Charmer* (1856), 23 Beav. 195), the evidence of experts is nissible to determine what were the words employed or meant. seems that where it is alleged that the document is illegible, s for the Court, and not for the jury, to decide whether it is gible; in other words, the Court will not resort to the evidence experts to decipher the instrument, unless it is unable to do so itself: *Remon* v. *Hayward* (1835), 2 Ad. & El. 666.

Foreign language.

Illegible documents.

There is an exception to the rule that evidence of intention is er admissible, for, as will be seen hereafter, in cases of equivoca-

Equivocation.

tion, by which is meant cases where the description in t document of a person or thing is equally applicable to sever persons or things, direct evidence of intention is admissible determine which of such persons or things the writer intended point out by such description.

Meaning of word defined by Act of Parliament.

Where the meaning of a word has been define by an Act of Parliament, no extrinsic evidence admissible to show that the parties to the dee used it in any other meaning.

Weights.

In *Noble* v. *Durell* (1789), 3 T. R. 271, a "pound," and *Hockin* v. *Cooke* (1791), 4 T. R. 314, a "bushel," were held to the statutory pound and bushel; and see *R.* v. *J. Major* (1792), T. R. 750.

Measures.

In *The Master and Brethren of St. Cross* v. *Lord Howard Walden* (1795), 6 T. R. 338, it was held that the reservation in lease of so many quarters of corn must mean quarters as defin by the Act of Parliament, and not customary quarters.

Feast days.

In *Doe* d. *Spicer* v. *Lea* (1809), 11 East, 312, evidence was n admitted to show that by the words "the feast of St. Michael was meant Old Michaelmas Day, though, as was pointed o by the Court, intrinsic evidence might have been used for th purpose.

"Acre."

In *O'Donnell* v. *O'Donnell* (1878), 1 L. R. Ir. 284, and appeal (1882), 13 L. R. Ir. 226, "acre" was held to be t statutory acre, and "if one sells land and is obliged that it co taineth twenty acres this shall be according to the law and n according to the custom of the country" : *per* Gawdy, J., *Wing Earle* (1592), Cro. Eliz. 267. See 1 Smith's Leading Cases, p. 6 (12th ed.), notes to *Wigglesworth* v. *Dallison*.

Nor will evidence be admitted on an indictment to show that word used in a statute relating to a trade may be interpret according to the meaning borne by the word in the trade : *Att.-Ge* v. *Cast-Plate Glass Co.* (1792), 1 Anst. 39; 3 R. R. 543; where t Court held with regard to glass that "squared" meant cut in a rectangular shape but not necessarily in a shape having equilate sides, but refused to admit evidence of a trade usage by whi "squared" meant "shaped for sale," the question being wheth the defendants had complied with the statutes when they cut t glass plates with rounded sides.

Technical legal terms.

In the application of the rule to the interpret tion of deeds containing technical legal term since the draftsman probably used those terms

their technical meanings, such meanings must be affixed to them unless excluded by the context.

The rule is applied to the construction of Acts of Parliament: *rd* v. *Briggs* (1881), 19 Ch. D. 22; and to wills.

In *Roddy* v. *Fitzgerald* (1858), 6 H. L. C. 823; 108 R. R. 327; d Wensleydale, in laying down the rules for the interpretation wills, which do not appear to differ in this respect from those ployed for deeds, says (at p. 877): "It is another and most portant rule in the construction of the words used in a will that nical terms, or words of known legal import, must have their per legal effect attributed to them, although the testator uses onsistent terms or gives repugnant and impossible directions. deprive the technical words of their appropriate sense, there st be sufficient to satisfy a judicial mind that they were meant the testator to be used in some other sense, and to show what t sense is."

See also the remarks of Lord Sterndale, M.R., in *Re Bostock's tlement*, *Norrish* v. *Bostock*, [1921] 2 Ch. 469, at p. 480: "I nk the true result is that stated in Lewin on Trusts (12th ed.), 125: 'But though technical terms be not absolutely necessary, where technical terms are employed they shall be taken in their l and technical sense . . . at the present day it must be sidered a clear and settled canon that a limitation in a trust, fected and declared by the settlor, must have the same construction as in the case of a legal estate, executed.' Applying that lt to this case, I think here strict legal conveyancing language been used, and it must receive its legal meaning." *S. C.*, 91 J. Ch. 17.

"It must be remembered that these words (*sc.* 'restoration' 'confirmation') "have for many years been used by learned veyancers whose preciseness of language has often been the ject of undeserved reproach, and it is to my mind impossible to me that they meant the opposite of what they say": *per* Lord kmaster in *Parr* v. *Att.-Gen.*, [1926] A. C. 239, at p. 266; 95 J. K. B. 417.

Language of conveyancers.

'The will is confessedly not the natural language of the ator himself, but the professional language of the conveyancer was employed to draw it. Surely it is difficult to maintain in construing such a will the same sense ought to be imputed s language as if the subject of construction were a document n ordinary kind, framed in natural language, and treating of chnical matters": *per* Williams, J., *Thellusson* v. *Rendlesham* 9), 7 H. L. C. 429, at p. 486; 28 L. J. Ch. 948; 115 R. R. 229.

"Seised."

'We must attach some meaning to the word ('seised'), and if

we are not to take the proper meaning, but some other meanin what other meaning is it to be? If we are to guess at the meani which the testatrix attached to the word, where are we to stop Therefore, it seems to me that the word must either be meanin less, or else must have its proper technical meaning": *p* Bramwell, L.J., *Leach* v. *Jay* (1878), 9 Ch. D. 42, at p. 45; L. J. Ch. 876. See also *Re Norman*, [1914] W. N. 303, where t question was whether a testator died seised of copyholds to whi he had not been admitted.

"The rule is to adopt the legal and technical meaning of t word unless it is controlled by the context": *per* Jessel, M.R *Smith* v. *Butcher* (1878), 10 Ch. D. 113, at p. 114; 48 L. J. C 136.

"As regards our duty when wills come before us for constructi it is obvious to say that it is in each case to consider the words the will. I say that, for the purpose of calling attention to t argument that in the absence of any rule of law laid down established by cases, we are at liberty to construe wills as ordina intelligent persons would do. There is a fallacy in this. We a bound to have regard to any rules of construction which have be established by the Courts, and subject to that we are bound construe the will as trained legal minds would do. . . . We mu therefore construe the will as we should construe any oth document": *per* Cotton, L.J., *Ralph* v. *Carrick* (1879), 11 Ch. 873, at p. 878; 48 L. J. Ch. 801.

Evidence as to meaning of technical legal terms inadmissible.

It must be remembered that, as the Judge before whom the ca is being argued is able, and is the only person authorised, to gi an authoritative declaration of the law applicable to it, no eviden is admissible as to the meaning of the technical legal wor employed other than decisions of other Judges.

Text-books.

Some few old text-books are also considered as being authority, and the Judges are in the habit of paying attention the practice of conveyancers.

"It is obvious that the terms of these three Acts" (the Settl Land Act, 1925, the Trustee Act, 1925, and the Law of Proper Act, 1925) . . . must give rise to a number of problems conveyancing, and in the law under which property is held a to be dealt with. . . . These problems must now be determin by the rules of law applicable to the interpretation of statut They cannot be solved by reliance upon the opinions of writers text-books, however able, who are yet living, or of those who ha been closely and devotedly identified with the passage of t legislation through Parliament": *per* Lord Hanworth, M.R., *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62; 96 L. J. C 388. Such expressions of opinion "are no authority on the c

Text-books by eminent living authors.

ction and effect of recent legislation; at the most they can only ıdopted by counsel as embodying their argument or by the rt as representing its ultimate view" : *ibid. per* Sargant, L.J.,). 84.

Practice of conveyancers.

'It has been sometimes said *communis error facit jus*; but I *communis opinio* is evidence of what the law is : not where it n opinion merely speculative and theoretical floating in the ds of persons, but where it has been made the groundwork substratum of practice upon which powers of this sort have ı erected and acted upon from the time of 32 Hen. 8 down to present time; all of which have been framed under the sup- tion that the various covenants which the author of the power cribed were capable of being enforced. For what purpose can suppose that persons conversant in drawing wills and family lements have gone on prescribing those terms where no one ı and no one covenant except that for payment of rent could nforced" : *per* Lord Ellenborough, C.J., *Isherwood* v. *Oldknow* 15), 3 M. & S. 382, at p. 396; 16 R. R. 305.

'I put this case on the practice of conveyancers, and after the se which I have heard at the bar of the House of Lords and where upon that subject, I am not sorry to have this oppor- ty of stating my opinion that great weight should be given to practice" : *per* Lord Eldon, C., *Howard* v. *Ducane* (1823), & R. 81, at p. 87; 23 R. R. 19; and see his remarks in *Smith Doe* (1821), 2 Brod. & Bing. 473, at p. 599; 22 R. R. 19; *S. C. nom. Smith* v. *Earl Jersey*, 3 Bligh P. C. 290, at p. 444; the remarks of Erle, C.J., in *Heelis* v. *Blain* (1864), 18 C. B. .) 90, at p. 108.

'The settled practice of conveyancers is to be looked upon as of the common law" : *per* James, L.J., *Re Ford and Hill* 9), 10 Ch. D. 365, at p. 370; 48 L. J. Ch. 327. "I agree with Vice-Chancellor that the practice of conveyancers, although it not decide the point, is not wholly irrelevant" (in construing s) : *per* Jessel, M.R., *Re Athill, Athill* v. *Athill* (1880), 16 D. 211, at p. 223; 50 L. J. Ch. 123; and see *per* Byrne, J., *is Hospital and Hague's Contract*, [1899] 2 Ch. 540, at 51; 68 L. J. Ch. 673; but "although I respect the practice and ions" of conveyancers "greatly, I am not at liberty to regard ı as the law," *per* Bacon, V.-C., *Anson v. Potter* (1879), 13 Ch. 41, at p. 143; and in *Mason* v. *Ogden*, [1903] A. C. 1; 72 L. J. 152, "Upon counsel for the respondents urging that a reversal e decision below would upset the practice of conveyancing, the of Halsbury, L.C., observed that if necessary he should have esitation in upsetting that practice. As the reader will see it not necessary" : *ibid.* p. 2.

Mercantile contracts.

The rule that technical words must bear their technical meani in instruments relating to the art or science to which they belon is of the greatest importance in the interpretation of mercanti contracts, the rule as to which appears to be laid down correctly b the learned authors of Manning and Granger's Reports, in the no to *Lewis* v. *Marshall* (1844), 7 Man. & Gr. 729, at p. 745; 13 L. C. P. 153; 66 R. R. 777, viz. :—

Rules as to mercantile contracts.

> In construing a *usual* mercantile contract, th question is, in what sense have the terms been use in similar contracts? In the case of an *unusu* contract, have the terms acquired any, and wha peculiar meaning in general mercantile language o in the particular trade?

"On the present occasion, the question was, whether there w a recognised practice and usage with reference to the voyage an business out of which the written contract, the subject-matter the action, arose, and to which it related, which gave a particul sense to the words employed in it, so that the parties might b supposed to have used these words in such sense.

Usage.

"The character and description of evidence admissible for th purpose is, the fact of a general usage and practice prevailing in th particular trade or business, not the judgment and opinion of th witnesses; for the contract may be safely and correctly interpret by reference to the fact of usage; as it may be presumed that suc fact is known to the contracting parties, and that they contract conformity thereto; but the judgment or opinion of the witness called affords no safe guide for interpretation, as such judgment o opinion is confined to their own knowledge": *per* Tindal, C.J *Lewis* v. *Marshall* (1844), 7 Man. & Gr. 729, at p. 744; 13 L. C. P. 153; 66 R. R. 777.

Mercantile usage and custom.

"Mercantile contracts are very commonly framed in a langua peculiar to merchants: the intention of the parties, though perfect well known to themselves, would often be defeated if this langua were strictly construed according to its ordinary import in the wor at large: evidence, therefore, of mercantile usage and custom admitted in order to expound it and arrive at its true mea ing. . . . In the construction of a contract among merchant tradesmen or others, the evidence will not be excluded because th words are in their ordinary meaning unambiguous; for the princip of admission is, that words perfectly unambiguous in their ordina meaning are used by the contractors in a different sense from that" *per* Coleridge, J., *Brown* v. *Byrne* (1854), 3 El. & Bl. 703, p. 715; 23 L. J. Q. B. 313; 97 R. R. 715.

'The duty of the Court, or of an arbitrator who is in the place he Court, is so to construe a contract as to give effect to the ntion of the parties. Now, although parol evidence is not nissible to contradict a contract, the terms of which have but ordinary meaning and acceptation, yet if the parties have used ns which bear not only an ordinary meaning, but also one uliar to the department of trade or business to which the tract relates, it is obvious that due effect would not be given to intention, if the terms were interpreted according to their nary and not according to their peculiar signification. There-, whenever such a question has come before the Courts, it has ays been held that where the terms of the contract under con-ration have, besides their ordinary and popular sense, also a uliar and scientific meaning, the parties who have drawn up the tract with reference to some peculiar department of trade or iness, must have intended to use the words in the peculiar e. This is but an application of the well-known rule that the rpretation of contracts must be governed by the intention of parties. And from the nature of the case, the peculiar meaning he terms used can be discovered only by means of parol lence" : *per* Cockburn, C.J., *Myers* v. *Sarl* (1860), 3 El. & El. at p. 315; 30 L. J. Q. B. 9; 122 R. R. 710.

Trade terms.

'Now the rule governing the admissibility of evidence to explain language of contracts is, that words relating to the transactions ommon life are to be taken in their plain, ordinary and popular ning; but if a contract be made with reference to a subject-ter as to which particular words and expressions have by usage uired a peculiar meaning different from their plain ordinary e, the parties to such a contract, if they use those words or essions, must be taken to have used them in their restricted peculiar signification. And parol evidence is admissible of the e which affixes that meaning to them. The admissibility of evidence does not depend upon whether the expression to be trued is ambiguous or unambiguous; but merely upon whether ot the expression has, with reference to the subject-matter of contract, acquired the peculiar meaning" : *per* Hill, J., *ibid.*, . 318.

Usage.

'I agree with my brother Hill that the words of a written mercial contract are to be understood in the sense which they acquired in the trade to which the contract relates. It is a *a facie* presumption that, if the parties to such a contract use essions which bear a peculiar meaning in the trade, they use in that peculiar meaning; which can be ascertained only by evidence. I do not think that it is necessary, in order to er such evidence admissible, that there should be any ambiguity

Trade terms.

on the face of the phrase which has to be construed. . . . That take to be the true rule of law upon the subject; that when it shown that a term or phrase in a written contract bears a peculi meaning in the trade or business to which the contract relates, th meaning is, *prima facie*, to be attributed to it, unless, upon t construction of the whole contract, enough appears, either fro express words or by necessary implication, to show that the parti did not intend that meaning to prevail" : *per* Blackburn, J., *ibid* at p. 319.

"The Court it is which, when once it is in possession of t circumstances surrounding the contract, and of any peculiarity meaning which may be attached by reason of the custom of t trade, to any of the words of that contract, has to place t construction upon that contract. . . . Now having submitted your Lordships what I understand to be the natural and liter meaning of this contract, I ask how is that natural meaning to got rid of? My Lords, I conceive in this way, and only in th way. It was of course competent for those who were resisting t application of this natural construction of the contract, to ha said : 'We will prove by evidence that according to the custom the trade, these words, which have this natural signification, a used in a wider or in a different sense.' . . . That of cour would, according to the well-known rule of law which admits par evidence, not to contradict a document, but to explain the wor used in it, supply, as it were, the mercantile dictionary in whic you are to find the mercantile meaning of the words which are use That would be a legitimate and well-known mode of construing t document" : *per* Cairns, L.C., *Bowes* v. *Shand* (1877), 2 App. Ca 455, at pp. 462, 468; 46 L. J. Q. B. 561. But the custo by which it is sought to explain the instrument must not inconsistent with the terms of the instrument : *Re Sutro & C and Heilbut, Symons & Co.*, [1917] 2 K. B. 348, at p. 366; L. J. K. B. 1226; *Miller, Gibb & Co.* v. *Smith and Tyrer, Ltd* [1917] 2 K. B. 141; 86 L. J. K. B. 1259.

Custom of trade.

Examples.

Examples of cases in which evidence has been admitted explain technical words :—

Building contract.

In a building contract : "per superficial yard of work ni inches thick" : *Symonds* v. *Lloyd* (1859), 6 C. B. (N.S.) 691; 1 R. R. 335; "weekly account" : *Myers* v. *Sarl* (1860), 3 El. & E 306; 30 L. J. Q. B. 9; 122 R. R. 710.

Charter-party.

In a charter-party : "month" : *Jolly* v. *Young* (1794), 1 Es N. P. C. 186; "in turn to deliver" : *Robertson* v. *Jackson* (1845 2 C. B. 412; 15 L. J. C. P. 28; 69 R. R. 490; "in regular tur of loading" : *Leidemann* v. *Schultz* (1853), 14 C. B. 38; 23 L. C. P. 17; 98 R. R. 523; see also *Hudson* v. *Clementson* (1856

C. B. 213; "in regular turn": *Lawson* v. *Burness* (1862), 1 & C. 396; 130 R. R. 581; "port": *Sailing Ship "Garston"* . v. *Hickie & Co.* (1885), 15 Q. B. D. 580.

Sport.

In a contract relating to sport: "across country": *Evans* v. *ıtt* (1842), 3 Man. & Gr. 759; "P.P.": *Daintree* v. *Hutchinson* 342), 10 M. & W. 85.

Theatrical agreement.

In a theatrical agreement: "three years": *Grant* v. *Maddox* 346), 15 M. & W. 737; 16 L. J. Ex. 227; 71 R. R. 815.

Service.

In a contract of service: "to serve from 11th November next til 11th November, 1817" (the evidence was to show that certain idays were allowed): *R.* v. *Inhabitants of Stoke-upon-Trent* 343), 5 Q. B. 303; 13 L. J. M. C. 41; "the same ground" (the vant being a commercial traveller): *Mumford* v. *Gething* (1859), . B. (N.S.) 305; 29 L. J. C. P. 105; 121 R. R. 501.

Contract for sale.

In a contract for sale: "mess pork of Scott & Co." (to show t this meant manufactured by Scott & Co.): *Powell* v. *Horton* 36), 2 Bing. N. C. 668; 5 L. J. C. P. 204; 42 R. R. 689; old 18 pockets Kent hops at 100s." (to show that the price s meant to be £5 per cwt.): *Spicer* v. *Cooper* (1841), 1 Q. B. ; 10 L. J. Q. B. 241; 55 R. R. 298; "good" and "fine" ley: *Hutchinson* v. *Bowker* (1839), 5 M. & W. 535; "bale" of nbier (to show that by usage it meant a package of a particular cription): *Gorissen* v. *Perrin* (1857), 2 C. B. (N.S.) 681; 27 J. C. P. 29; 109 R. R. 830.

"Freehold equities."

In a contract for sale the purchase price was stated to be ,000 to be paid as to £16,000 in cash and as to £1,000 in eehold equities." A list made out and produced to the vendor the purchaser showing a list of freeholds to the equity of emption of which the purchaser was entitled, held admissible way of parol evidence to explain the meaning of the term: *ts* v. *Snelling* (1883), 48 L. T. 216.

Leases.

In a lease of a rabbit warren: that by custom of the country e thousand rabbits" means 1,200: *Smith* v. *Wilson* (1832), 3 & Ad. 728; 1 L. J. K. B. 194; 37 R. R. 536.

In a lease of "warren of conies": *Robinson* v. *Duleep Singh* 9), 11 Ch. D. 798, at p. 834; 48 L. J. Ch. 758.

In an agreement for an agricultural lease: "mines and erals": *Tucker* v. *Linger* (1882), 21 Ch. D. 18; 51 L. J. Ch. (1883), 8 App. Cas. 508.

In a mining lease: "level": *Clayton* v. *Gregson* (1836), 5 Ad. . 302; 44 R. R. 427.

Policy of insurance.

In a policy of insurance on a ship: to show whether the words e East Indies, East India Islands," included the Mauritius: *ertson* v. *Clarke* (1824), 1 Bing. 445; 2 L. J. (O.S.) C. P. 71; . R. 676.

In an open policy on freight : that "freight" meant by usa the gross, and not the net amount of the freight : *Palmer* *Blackburn* (1822), 1 Bing. 61; 1 L. J. (o.s.) C. P. 1; 25 R. R. 59

Bill of lading.

In a bill of lading : "freight for the said goods five-eighths of penny sterling per pound, with five per cent. primage and avera accustomed," to show that by custom three months' interest discount is deducted from freights payable under bills of lading goods coming from certain ports : *Brown* v. *Byrne* (1854), 3 El. Bl. 703; 23 L. J. Q. B. 313; 97 R. R. 715. "Freight at the ra of 80s. per ton of 20 cwt., gross weight, tallow, other goods, grai or seed, in proportion, as *per* London Baltic printed rates" : *Th Russian Steam Navigation Co.* v. *Silva* (1863), 13 C. B. (N.S 610; 134 R. R. 676.

Underwriting contract.

In a contract to take shares : "underwrite" and "discount" *Re Licensed Victuallers' Mutual Trading Association, ex p. Audai* (1889), 42 Ch. D. 1; 58 L. J. Ch. 467.

The cases in which evidence of custom has been admitted (a) t explain the meaning of terms usual in a contract, and (b) to ingra stipulations on to the written contract, which second propositio is discussed *infra* in Chapter VIII, are collected in the notes t *Wigglesworth* v. *Dallison*, 1 Sm. L. C. (12th ed.) 620; in Taylor o Evidence, Pt. IV, c. iv—(a) ss. 1162 *et seq* (pp. 797 *et seq* 11th ed), and (b) ss. 1168 *et seq.* (pp. 801 *et seq.*, 11th ed.); and i Roscoe's Nisi Prius Evidence, pp. 19 *et seq.* (19th ed.).

Statement of the above rules applied to wills by Wigram, V.-C.

The preceding rules in this chapter are co-extensive with th 2nd, 3rd, 5th and 6th propositions laid down for the interpretatio of wills in Wigram on Extrinsic Evidence. See 3rd. ed., at pp. 17 42 and 51; 4th ed., at pp. 18, 56, 65 and 94; and in the 5th ed. at pp. 18, 47, 56 and 91.

CHAPTER V.

DEED TO BE CONSTRUED AS A WHOLE.

ed to be Construed as a Whole: Context: Series of Deeds: Repugnant Clauses: Repugnant Words Rejected: Omitted Words Supplied: Words Transposed: Parentheses Inserted: False Grammar: Incorrect Spelling.

F course every deed must be construed as a whole, and—

Where the literal meaning of a word is excluded by the context, there must be affixed to the word such of the meanings that it properly bears as will enable a uniform and consistent intention to be collected from every part of the deed.

Literal meaning excluded by context.

The application of this rule is often called applying intrinsic idence.

Intrinsic evidence.

"In every deed a reasonable intention shall be construed, ough the words sound to a contrary meaning": *Bold* v. *olyneux* (1536), Dyer 14 b, at p. 15 a.

"Every part of the deed ought to be compared with the other d one entire sense ought to be made thereof": *per* Staunford, J., *rockmerton* v. *Tracy* (1555), 1 Plow. 145, at p. 161.

"The word (*appertaining* to the messuage) shall be here taken the sense of *usually occupied* with the messuage or *lying* to the ssuage, for when *appertaining* is placed with the said other words cannot have its proper signification . . . and therefore it shall ve such signification as was intended between the parties, or else shall be void, which it must not be by any means, for it is nmonly used in the sense of *occupied with* or *lying to*, *ut supra*, l being placed with the said other words it cannot be taken in other sense, nor can it have any other meaning than is agree- e with law, and forasmuch as it is commonly used in that sense s the office of Judges to take and expound the words which mon people use to express their meaning, according to their ning, and therefore it shall be here taken not according to the e definition of it, because that does not stand with the matter,

"Appertaining."

but in such sense as the party intended it" : *per Curiam*, *Hill* v *Grange* (1556), 1 Plow. 164, at p. 170.

Entire deed.

"Every deed ought to be construed according to the intentio of the parties, and the intents ought to be adjudged of the severa parts of the deed, as a general issue out of the evidence, and inten ought to be picked out of every part, and not out of one wor only" : *per* Hobart, C.J., *Trenchard* v. *Hoskins* (1624), Winch 91, at p. 93.

It is a rule that the construction of a deed "be made upon th entire deed, and that one part of it doth help to expound another and that every word (if it may be) may take effect and none b rejected, and that all the parts do agree together and there be n discordance therein. *Ex antecedentibus et consequentibus es optima interpretatio;* for *turpis est pars quae cum suo toto no convenit. Maledicta expositio quae corrumpit textum*" : Shep Touch. 87.

General frame of deed.

"*Qui haeret in litera haeret in cortice*, especially in the case o trusts, which are to be ruled and governed according to the inten of the parties, where such intent is consistent with the rules of law and the Court will, from the general frame of a testament or settle ment, collect the intent, contrary to the express words of particular clause" : *per* Henley, L.K., *Earl of Northumberland* v *Earl of Egremont* (1759), 1 Ed. 435, at p. 446; citing *Coryton* v *Helyar* (1745), 2 Cox, 340, where an absolute term of ninety-nin years limited to J. C., amongst other limitations of real estate i a will, was cut down on the construction of the whole will to a tern determinable on the death of J. C.

"It is a true rule of construction that the sense and meaning o the parties in any particular part of an instrument may be collecte *ex antecedentibus et consequentibus*; every part of it may b brought into action in order to collect from the whole one uniforn and consistent sense, if that may be done" : *per* Lord Ellen borough, C.J., *Barton* v. *Fitzgerald* (1812), 15 East, 530, at p. 541 13 R. R. 519.

Whole deed to be read.

"In the construction of all instruments it is the duty of th Court not to confine itself to the force of a particular expression but to collect the intention from the whole instrument take together. But a Court is not authorised to deviate from the forc of a particular expression, unless it finds, in other parts of th instrument, expressions which manifest that the author of th instrument could not have the intention which the literal force of particular expression would impute to him. However capricio may be the intention which is clearly and unequivocally expresse every Court is bound by it, unless it be plainly controlled by othe

.rts of the instrument" : *per* Leach, V.-C., *Hume* v. *Rundell* 824), 2 S. & S. 174, at p. 177.

"If the provisions are clearly expressed, and there is nothing enable the Court to put upon them a construction different from at which the words import, no doubt the words must prevail; ıt if the provisions and expressions be contradictory, and if there grounds appearing upon the face of the instrument affording oof of the real intention of the parties, then that intention will evail against the obvious and ordinary meaning of the words. the parties have themselves furnished a key to the meaning the words used, it is not material by what expression they nvey their intention" : *per* Cottenham; L.C., *Lloyd* v. *Lloyd* 837), 2 My. & Cr. 192, at p. 202; 5 L. J. Ch. 135; 45 . R. 25.

Key furnished by parties.

"In the construction of deeds, ordinary words ought to be given eir plain and ordinary meaning" : *per* Swinfen Eady, L.J., in *eard* v. *Moira Colliery Co.*, [1915] 1 Ch. 257, at p. 268; 84 . J. Ch. 155.

Words.

"It is said, the terms used in the deed are terms of art which ıve a definite legal meaning and must be construed accordingly. ut assuming that to be so, it is certain that the context may show at they are not used in that sense. The word 'son' has a finite legal meaning—namely, legitimate son—but if in a deed it peared a person was speaking of his illegitimate children, it is ear the word 'son' might mean an illegitimate son" : *per* amwell, B., *Monypenny* v. *Monypenny* (1858), 4 K. & J. 174, p. 182.

"Son."

Observations to a like effect will be found in :—*Lee* v. *Brace* 696), 12 Mod. 101, *per* Holt, C.J.; Carth. 343; 3 Salk. 337; olt, 668; *Fisher* v. *Wigg* (1700), 1 P. Wms. 14, *per* Gould, J.; *ıtler* v. *Duncomb* (1718), 1 P. Wms. 448, *per* Parker, L.C., at 457; *Hodgeson* v. *Bussey* (1740), 2 Atk. 89, *per* Hardcke, L.C., at p. 90; *S. C. sub nom. Hodgson* v. *Bussy*, Barn. Ch. p. 195; *Parkhurst* v. *Smith* (1742), Willes, 327, *per* Willes, C.J., p. 332; *S. C. sub nom. Smith* v. *Packhurst*, 3 Atk. 135, at 136; *Wright* v. *Kemp* (1789), 3 T. R. 470, *per* Kenyon, C.J., d Ashurst, J., at pp. 472, 473; *Woodcock* v. *Duke of Dorset* 792), 3 Bro. C. C. 569, *per* Thurlow, L.C., at p. 570; *Payler* v. *mersham* (1815), 4 M. & S. 423, *per* Ellenborough, C.J., at 426; 16 R. R. 516; *Solly* v. *Forbes* (1820), 4 Moore, 448, *per* llas, C.J.; 22 R. R. 641; *Lansdowne* v. *Lansdowne* (1820), 2 gh, 60, *per* Eldon, L.C., at p. 88; 21 R. R. 43; *Cholmondeley* *Clinton* (1820), 2 J. & W. 1, *per* Plumer, M.R., at p. 89; 22 R. 84; *Monypenny* v. *Monypenny* (1859), 3 De G. & J. 572, Chelmsford, L.C., at p. 588; *Hext* v. *Gill* (1872), L. R. 7 Ch.

699, *per* Wickens, V.-C., at p. 705, n.; 41 L. J. Ch. 671; *Taylor* v. *Corporation of St. Helens* (1877), 6 Ch. D. 264, *per* Jessel, M.R., at p. 270; 46 L. J. Ch. 857; *Laird* v. *Briggs* (1881), 19 Ch. D. 22, *per* Jessel, M.R., at p. 34; and *Tucker* v. *Linger* (1882), 21 Ch. D. 18, *per* Jessel, M.R., at p. 36; 51 L. J. Ch. 713.

"The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed": *per* Sir John Romilly, M.R., in *Re Strand Music Hall Co., Ltd.* (1865), 35 Beav. 153, at p. 159.

"Month."

Thus, though "in temporal matters" *month* means lunar month, it may be shown by the context to mean calendar month: *Lang* v. *Gale* (1813), 1 M. & S. 111; 149 R. R. 817; *R.* v. *Inhabitants of Chawton* (1841), 1 Q. B. 247; 10 L. J. M. C. 55; 55 R. R. 246; *Simpson* v. *Margitson* (1847), 11 Q. B. 23; 17 L. J. Q. B. 81; 76 R. R. 278. In *Phipps & Co., Ltd.* v. *Rogers*, [1925] 1 K. B. 14; 93 L. J. K. B. 1009, it was held that the expression in a tenancy agreement "three months" meant three lunar months, there being no clear contrary intention, and the relationship of landlord and tenant not coming within any of the statutory exceptions.

In mortgage transactions "month" means a calendar month: *Schiller* v. *Petersen & Co.*, [1924] 1 Ch. 394; 93 L. J. Ch. 386.

New Law.

Section 61 of the Law of Property Act, 1925, provides that in deeds and other instruments made or taking effect after 1925 the word "month" means calendar month, unless the context otherwise requires.

Promissory note.

The stamp and figures may be looked at to explain a promissory note: *Hutley* v. *Marshall* (1882), 46 L. T. 186.

Contemporaneous deeds to be read together.

If the transaction between the parties is contained in more than one deed, all the deeds must be construed together, and one may be read to explain the others.

"The law neither sees nor regards any time but the time of the first agreement, notwithstanding divers assurances be in different times and all but to perfect one assurance, and by construction of law they shall all be said to be made at one and the same time; otherwise you may shake all assurances": *per* Mountague, C.J., *Havergil* v. *Hare* (1617), 3 Buls. 250, at p. 256.

Lease and release.

"The lease and release are but in nature of one deed": *per* North, C.J., *Barker* v. *Keat* (1677), 2 Mod. 249, at p. 252.

Fine and recovery.

"For at law a fine and recovery and deed to lead the uses are

t one conveyance" : *per* Holt, C.J., *Mountague* v. *Bath* (1693), Rep. in Ch. 417, at p. 434.

"And the deed, the fine and the recovery may well be taken as veral parts of one and the same conveyance" : *per* Trevor, C.J., *bot* v. *Burton* (1708), 11 Mod. 181, at p. 184; 2 Salk. 590, p. 591.

Series of deeds.

"When documents are actually contemporaneous, that is, two eds executed at the same moment, a very common case, or within short an interval that having regard to the nature of the transtion the Court comes to the conclusion that the series of deeds presents a single transaction between the same parties, it is then at they are all treated as one deed : and of course one deed tween the same parties may be read to show the meaning of a atence, and be equally read, although not contained in one deed, t in several parchments, if all the parchments together in the ew of the Court make up one document for this purpose" : *per* ssel, M.R., *Smith* v. *Chadwick* (1882), 20 Ch. D. 27, at p. 62; L. J. Ch. 597; and *Anderson's Case* (1877), 7 Ch. D. 75, at 98; 47 L. J. Ch. 273, where the articles of association of a mpany were read to explain the memorandum : *Re Capital, etc., sociation* (1882), 21 Ch. D. 209, at p. 212.

Memorandum and articles.

"Where several deeds form part of one transaction and are ntemporaneously executed they have the same effect for all rposes such as are relevant to this case as if they were one ed. Each is executed on the faith of all the others being ecuted also and is intended to speak only as part of the one nsaction, and if one is seeking to make equities apply to the rties they must be equities arising out of the transaction as a ole. It is not open to third parties to treat each one of them a deed representing a separate and independent transaction for e purpose of claiming rights which would only accrue to them the transaction represented by the selected deed was operative parately" : *per* Fletcher-Moulton, L.J., in a dissenting judgment *Manks* v. *Whiteley*, [1912] 1 Ch. 735, at p. 754; 81 L. J. Ch. 7, reversed *sub nom. Whiteley* v. *Delaney*, [1914] A. C. 132; 83 J. Ch. 349.

Whether executed at one time;

This rule applies whether the deeds be executed simultaneously : *on.*, cited by Doddridge, J., in *Thurman* v. *Cooper* (1618), 2 ll. Rep. 23; *Gale* v. *Williamson* (1841), 8 M. & W. 405; 58 R. R. 9; 10 L. J. Ex. 446; *Harman* v. *Richards* (1852), 10 Hare, 81; *pgood* v. *Ernest* (1865), 3 De G. J. & S. 116; 142 R. R. 36; d *Edwards* v. *Marcus*, [1894] 1 Q. B. 587; 63 L. J. Q. B. 3; or at different times : *Lord Cromwel's Case* (1601), 2 Rep. b, at p. 75 a; *Havergill* v. *Hare* (1618), Cro. Jac. 510; *S. C.* *nom. Havergall* v. *Hare*, Pop. 147; *sub nom. Havergil* v.

or at divers times.

Hare, 3 Buls. 250; *Farrowes* v. *Farmer* (1622), 2 Roll. Rep. 245; *S. C. sub nom. Ferrers* v. *Fermor*, Cro. Jac. 643; *King* v. *Edwards* (1633), Cro. Car. 320; *Snape* v. *Turton* (1637), Cro. Car. 472; *Wigson* v. *Garret* (1675), 2 Lev. 149; *S. C. sub nom. The Earl of Leicester's Case*, 1 Vent. 278; *Addison* v. *Otway* (1677), 2 Mod. 233; *Herring* v. *Brown* (1687), Carth. 22 (reversing 2 Show. 185; 1 Vent. 371; Comb. 11; Skin. 184); *Jones* v. *Morley* (1697), 1 Ld. Raym. 287; 12 Mod. 159, where the question is discussed how far the uses of a fine may be varied before the fine is levied; *Hurd* v. *Fletcher* (1778), 1 Doug. 43; *Duke of Bolton* v. *Williams* (1793), 2 Ves. Jr. 138, where it was held that all the instruments securing an annuity form but one assurance, so that if the memorial is defective as to one it vitiates the whole; *Fowler* v. *Hunter* (1829), 3 Y. & J. 506; *Ford* v. *Stuart* (1852), 15 Beav. 493; 21 L. J. Ch. 514; 92 R. R. 524; *Whitbread* v. *Smith* (1854), 3 D. M. & G. 727; 23 L. J. Ch. 611; 98 R. R. 285; and Viner Abr. tit. "One Entire Conveyance." And they will be presumed to have been executed in that order which will enable the intent of the parties to be carried into effect; whether they be executed simultaneously: *Taylor* v. *Horde* (1757), 1 Burr. 60, at pp. 106 and 107; 2 Sm. L. C. (12th ed.), p. 610; *Doe* v. *Horde* (1777), Cowp. 689, at p. 699; *Gartside* v. *Silkstone, etc., Co.* (1882), 21 Ch. D. 762; or not: *Selwyn* v. *Selwyn* (1761), 2 Burr. 1131; 1 Bl. Rep. 222 and 251, where it was held that land would pass by a will executed after the deed to lead the uses of a recovery, and before the recovery suffered.

Order of execution.

Leases by copyholder.

A copyholder who could only grant a lease for a year, made three leases, each for a year, the second and third to commence two days after the expiration of the preceding lease. *Held*, that the three leases were one transaction and void: *Mathews* v. *Whetton* (1631), Cro. Car. 233.

Appointment and settlement.

A deed of appointment and a settlement were treated as contemporaneous, so as to be a fraud on a power: *Pryor* v. *Pryor* (1863), 11 W. R. 873; (1864), 12 W. R. 781.

Lease and counterpart read together: *Burchell* v. *Clark* (1876), 1 C. P. D. 602; 2 C. P. D. 88; 46 L. J. C. P. 115; *Matthews* v. *Smallwood*, [1910] 1 Ch. 777; 79 L. J. Ch. 322.

Bill of sale and mortgage.

Bill of sale and mortgage of a reversionary interest under a will read together, and bill of sale defeated by conditions contained only in the mortgage: *Edward* v. *Marcus* (*a*), [1894] 1 Q. B. 587; 63 L. J. Q. B. 363; so also where the conditions were printed on an accompanying card: *Smith* v. *Whiteman*, [1909] 2 K. B. 437; 78 L. J. K. B. 1073; and in a contemporaneous letter: *Hall* v. *Whiteman*, [1912] 1 K. B. 683; 81 L. J. K. B. 660.

(*a*) Distinguished in *Stott* v. *Shaw and Lee*, [1928] W. N. 14.

If there be two clauses or parts of the deeds repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary: Shep. Touch. 88.

Repugnant clauses.

This rule is laid down in numerous old cases and text-books, but may be doubted whether there is much authority for the rule, l it probably rests on the proposition that if a grant has been de to A there is nothing left in the grantor to grant to B, so t the grant to A is effective, while that to B is not. At any e, the rule is one which is only applied in the last resort, if Judge can find nothing else to assist him in determining the estion (see *per* Sir John Romilly, M.R., in *Bush* v. *Watkins* 851), 14 Beav. 425, at p. 432). It is a mere rule of thumb, as ssel, M.R., calls the converse rule applied to wills: see *Re water* (1881), 18 Ch. D., at pp. 19, 20. But the rule was stated Lord Wrenbury in delivering the judgment of the Privy uncil in *Forbes* v. *Git*, [1922] 1 A. C. 256, at p. 259; 91 L. J. C. 97, as follows: "If in a deed an earlier clause is followed a later clause which destroys altogether the obligation created the earlier clause, the later clause is to be rejected as repugnant l the earlier clause prevails. In this case the two clauses cannot reconciled and the earlier provision in the deed prevails over later."

Only a last resort.

The oldest authority for the rule is the judgment in *Blaunket Simonson*, Y. B. 2 Edw. 2 (1308), 29, wrongly numbered 26; Selden Society Publications, p. 126, where it is said: "And reover when two clauses are found in one deed, and they are divers natures and repugnant, regard should be had rather to first that stands in the deed than to those that are subsequent," l it was consequently held that a grant in frank-marriage endum in fee operated as a grant in frank-marriage only. See *derson* v. *Cleland*, [1910] 2 Ir. R. Ch. 334, at p. 378.

Frank-marriage.

"When there are two clauses in a deed, of which the later is tradictory to the former, there the former shall stand; as in z., *Feoffments and Faits*, 94; Y. B. 2 Edw. 2 (this reference is the case above mentioned); Y. B. 4 H. 6 (1425), 22, of a in frank-marriage, rendering rent, the reservation is void": Nicholas, B., *Cother* v. *Merrick* (1657), Hard. 89, at p. 94; to the same effect, *per* Lord Mansfield, C.J., *Doe* v. *Biggs* 09), 2 Taunt. 109, at p. 113; 11 R. R. 533; 2 Black. Com. 381, ng the case in Hard.; and also *per* Kindersley, V.-C., *Re bber* (1850), 17 Sim. 221, at p. 222; 19 L. J. Ch. 445; 83 R. R. . In *Sury's Case* (1626), Latch 264, it is said: "When there

is repugnance between the words, the law prefers the first: 2 Edw. 2, Feoffments, 94. So that if a lease is made reserving annually during the term £10 to the lessor for twenty years, this is a good reservation for the whole term. So in *Slingsby's Case* (1588), 5 Rep. 19, a lease to two, habendum jointly and severally they are joint tenants."

Lease.

Lease to three, habendum to them for their lives and the life of the survivor; proviso that one should take no interest during the lives of the others held void, as being repugnant: *Scovell and Cavel's Case* (1588), 1 Leon. 317.

A lessee for a hundred years made a lease to Thomas Seaman for forty years if he should so long live; and afterwards he leased the same land to John his son, habendum after the term of Thomas for twenty-three years, *to be counted from the date of these presents*. *Held*, that the lease to John began, not from the date but from the end of the term of Thomas, because when by the first words of the limitation it is a good lease to begin after the term of Thomas, it shall not be made void by any subsequent words: *Seaman's Case* (1611), Godb. 166.

Surrender.

Surrender of copyholds by J. R. to the use of A and B, "this surrender not to stand and be in full force until after the death of J. R." The latter words were rejected for the repugnancy: *Seagood* v. *Hone* (1634), Cro. Car. 366; Sir W. Jones, 342.

Life estate.

Conveyance to A, her heirs and assigns, habendum to A and her assigns during the life of G; G was A's heir-at-law. *Held*, that on A's death G took as special occupant, and that the land did not pass to A's executors by the words in the habendum: *Doe* v. *Steele* (1843), 4 Q. B. 663; 12 L. J. Q. B. 272; 62 R. R. 456.

"Sterling lawful money of Ireland."

"It being then impossible to affix a meaning to the words 'sterling lawful money of Ireland,' taken altogether, I must deal with them according to the rule of law as to construing a deed which is, if you find that the first words have a clear meaning, but those that follow are inconsistent with them, to reject the latter. And it appears to me that there is no possible method of dealing with this set of words other than by saying that the words 'one yearly rent-charge or sum of £1,000 sterling lawful money,' must be taken to stand by themselves, and the words 'of Ireland' must be rejected" *per* Shadwell, V.-C., *Cope* v. *Cope* (1846), 15 Sim. 118, at p. 126.

Question is really what is scope of deed.

It appears that in most of the cases the true reason for rejecting the latter words was that they were inconsistent with the general scope of the deed. In *Cother* v. *Merrick* (1657), Hard. 89, the question was whether a lease by a tenant in tail, where the reservation was to his heirs and assigns, was good within the statute of 32 Hen. 8 to bind the issue in tail, who was not the heir of

lessor; and the case was really decided upon the fact that the l "heirs" might be held to mean "heirs in tail." In the nd case of frank-marriage the reason for the decision appears e that a gift in frank-marriage cannot carry rent for four rations; and in *Doe* v. *Biggs* (1809), 2 Taunt. 109; 11 R. R. it was merely a dictum. In *Cope* v. *Cope* (*supra*), the con-ction really turned upon the whole tenor of the deed.

Real intention to be effectuated.

This view of the nature of the rule is supported by the following arks of Wilde, C.J., in delivering judgment in *Walker* v. *Giles* 8), 6 C. B. 662, at p. 702; 18 L. J. C. P. 323; 77 R. R. 425: s the different parts of the deed are inconsistent with each r, the question is, to which part effect ought to be given. re is no doubt that, applying the approved rules of construction his instrument, effect ought to be given to that part which is ulated to carry into effect the real intention, and that part ch would defeat it should be rejected; and so construing the l, the Court is of opinion that the latter part, importing a ise, cannot have that effect, without defeating the intention of parties.

Latter clause preferred.

In *Doran* v. *Ross* (1789), 1 Ves. Jr. 57; 3 Bro. C. C. 27, the er of two inconsistent clauses was, on the construction of the le settlement, allowed to prevail, though the Lord Chancellor ught that to do so was contrary to what the parties had meant lo.

Repugnant words may be rejected: omitted words may be supplied: words may be transposed: parentheses may be inserted: and false grammar or incorrect spelling may be disregarded: if the intention of the parties sufficiently appear from the context.

Repugnant words rejected.

'The result of all the authorities is that when a Court of law clearly collect from the language within the four corners of the l or instrument in writing the real intention of the parties, they bound to give effect to it by supplying anything necessarily to nferred from the terms used, and by rejecting as superfluous tever is repugnant to the intention so discerned": *per* y, C.B., *Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Ex. 209, . 215; 37 L. J. Ex. 122.

Leases.

'Et pur ceo jeo ne veux agréer a ceo que ad ēe dit, si un lesse 10 ans a volōt, que ceo sera determin' a volunt'; ceo n'est t: car or ceux parols a volunt' sont contrariant', & pur ceo void: car chescun parol' qui est contrariant' al'estat est ": *per* Brooke, J., Y. B. 14 Hen. 8 (1522), Mich. No. 6, 3 a.

"Si home lesse pour x. ans a volunte le lessour cest paro volunte est voyde car est repugnaunt": Bro. Abr. tit. Leas par. 13, fo. 60; Bac. Abd. tit. "Leases and Terms of Years (L) 3, vol. 4, p. 836 (7th ed.).

"From the day of the making" rejected as repugnant in reversionary lease: *Anon.* (1506), Dyer, 261 b, pl. 28.

Lease reserving rent payable at Michaelmas and Lady Day fourteen days thereafter, proviso for re-entry if rent unpaid *po aliquod terminorum vel festorum praedictorum in quo solvi debe* for the space of fourteen days *post aliquod festum praedict.*, th words "*post aliquod festum praedict.*" were rejected: *Clark an Kempton's Case* (1583), 4 Leon. 91.

Lease to three persons for their lives, proviso that if one shoul enter or take any profits during the lives of the others, then th estate limited to him should cease and be void, the proviso wa rejected as repugnant: *Moore and Savil's Case* (1585), 2 Leo 132.

Jointly and severally.

A grant or lease to two jointly and severally, the wo "severally" is rejected: *Slingsby's Case* (1588), 5 Rep. 18 b Jenk. Cent. 262, case lxiii. *S. C. sub nom. Beckwith's Case*, 2 Leo 47; 3 Leon. 160.

Demise for forty years containing covenant for quiet enjoyme "for the term of eighty years aforesaid," "eighty" was rejected (Temp. Eliz.) Savile, 71, cxlvii.

Bonds.

In a bond dated 1593 conditioned for payment "of lawf English money which shall be in the year 1599 in and upon th 13th October next ensuing the date hereof," "the date hereof were rejected: *Sharplus* v. *Hankinson* (1597), Cro. Eliz. 420.

Condition of a bond "To deliver 35,000 tiles to the value £144 at 15s. 6d. per 1,000." It is obvious that 185,800 tiles wou have cost £144. The mistake was corrected on the ground that th sum of money and not the number of tiles was the thing materia *Holmes* v. *Ivy* (1678), 2 Show. 15.

Repugnant condition in a bond rejected: *Wells* v. *Tregus* (1708), 2 Salk. 463.

Bond conditioned if the obligor should *not* pay. "Not" w rejected: *Anon.*, cited by Buller J., in *Bache* v. *Proctor* (178 Doug. 382, at p. 384.

After the death of A.

"After the death of A" were rejected in a settlement limiti land to A for ninety-nine years, if he should so long live, and *aft his death* or other sooner determination of the term to truste during the life of A, upon trust to preserve contingent remainde and after the determination of the term to the sons of A succession in tail: *Parkhurst* v. *Smith* (1742), Willes, 327; *S. sub nom. Smith* v. *Packhurst*, 3 Atk. 135.

o in *Barker* v. *Freeman* (1772), Lofft, 31, and *Goodtitle* d. *ton* v. *Burtenshaw* (1772), 1 Fearne's Cont. Rem. App., p. 570, narriage settlements where the limitations were to the use of r ninety-nine years if he so long live, and after his decease to tees to preserve contingent remainders during his life, the ls "after his decease" were rejected, or such words as "or r sooner determination of the said term" were read into the ements, in order to carry into effect the intentions of the ors, which would have failed for want of immediately vested nold estates on which to found the subsequent limitations.

Life estate.

n a marriage settlement a limitation to the use of the husband life was rejected as inconsistent with the whole deed: *Doran Ross* (1789), 1 Ves. Jr. 57; 3 Bro. C. C. 27.

n a release following a lease for a year to B, who was a trustee C, the hereditaments were granted unto C in his possession, , habendum to B and his heirs, to such uses as C should oint. *Held*, that the words "unto C, etc.," in the premises ht to be rejected: *Spyve* v. *Topham* (1802), 3 East, 115; . R. 559.

Proviso determining estate tail on death.

A proviso for determining an estate tail as if tenant in tail were d; this has been held a contrariant proviso and void on that ount, because the death of a tenant in tail does not determine estate tail, but his death without issue; and consequently to say the estate tail shall determine as if he were dead amounts to ng that it shall determine as it would do upon an event (*viz.*, h of tenant in tail), which event might not determine it, and efore such a proviso is contradictory and absurd in itself: rne's Cont. Rem. 252 (10th ed.), citing *Corbet's Case* (1600), ep. 83 b.

Tail male instead of tail general.

The word "male" was struck out from a limitation over upon oming entitled to real estate in tail male under W. M.'s will, n, in the events which had happened, the only possible estate under that will was an estate in tail general: *Re Alexander's lement*; *Jennings* v. *Alexander*, [1910] 2 Ch. 225; 79 L. J. Ch.

Proviso limiting covenant.

n a deed of dissolution of partnership B covenanted that *for notwithstanding any act done by him* it should be lawful for A eceive certain moneys without interruption of B, his executors dministrators, it was held that the words "*for &c.*" must be cted as being inconsistent with the subsequent parts of the nant, and that a receipt of the money by B's executors was a ch: *Belcher* v. *Sikes* (1828), 8 B. & C. 185.

Printed terms.

A lease for one year, made on a printed form with manuscript rations, was produced with many stipulations, most of which wholly inapplicable to such a tenancy; on the face of the

lease it appeared to have originally contained words creating tenancy from year to year, but these had been struck out : it wa held that all the terms inapplicable to a tenancy for a single yea must be considered as expunged or as only applicable in case th tenancy should continue : *Strickland* v. *Maxwell* (1834), 2 Cr. M. 539; 3 L. J. Ex. 161; 39 R. R. 839.

Separation deed.

A separation deed provided that all outgoings in respect c certain estates should be paid by J, the husband, up to a certai day, and that afterwards they should be paid by M, the wife, " an that J shall be indemnified therefrom *and from all the preser debts and liabilities of J.*" *Held*, that as the words in italics mad the clause inconsistent with itself they ought to be disregarded *Wilson* v. *Wilson* (1847), 15 Sim. 487.

Appointment.

In an appointment where a reference was made to a previou appointment as having been made in favour of O and her childrer the words " and her children " were rejected, the previous appoint ment having, in fact, been in favour of O alone : *Hanbury* v *Tyrell* (1856), 21 B. 322; 111 R. R. 106.

Grant of rent-charge.

In a deed of covenant, after reciting the grant of the site of canal in consideration of a perpetual rent-charge to be paid to or the person or persons to whom the inheritance of the site shoul belong in case the grant had not been made, a covenant with " and to and with the said person or persons to whom the freehol and inheritance of the hereditaments and premises hereinbefor recited to be released shall for the time being belong " to pay th said rent-charge, the words " shall for the time being belong " wer rejected as repugnant, and the payees were ascertained from th recitals and a subsequent deed : *Gwyn* v. *Neath Canal Navigatio Co.* (1868), L. R. 3 Ex. 209; 37 L. J. Ex. 122.

Proviso limiting liability.

Covenant by C, D, E and F, " churchwardens and overseers c the poor of the parish of Z, for themselves and for their successor churchwardens," etc., with A " that they, the said churchwarder and overseers of the poor, their successors or assigns," would pa certain sums, followed by a proviso that nothing in the deed shoul extend to any personal covenant of or obligation upon C, D, and F or in anywise personally affect them or any of them. *Hel* that the covenant was a personal covenant, and that the provis being repugnant thereto was void : *Furnivall* v. *Coombes* (1843 5 Man. & Gr. 736; 12 L. J. C. P. 265; 63 R. R. 455; 6 Scott, N. R 522; but such a proviso would not have been void if it had limitec without destroying, the personal liability : *Williams* v. *Hathawa* (1877), 6 Ch. D. 544. These last two cases are cited with approv by Lord Wrenbury in *Forbes* v. *Git*, [1922] 1 A. C. 256, at p. 259 91 L. J. P. C. 97.

Policy.

" Our opinion is that as it is a policy on the ship we must stril

all the immaterial stipulations which cannot possibly apply an assurance of the ship" : *per* Lord Esher, M.R., *Stewart* v. *rchants' Marine Insurance Co.* (1885), 16 Q. B. D. 619, at 621; 55 L. J. Q. B. 81.

Charter-party.

"We have a right to look at what is written into the printed n and at what is struck out. . . . There are stipulations in charter-party which ought to have been struck out if the ties had been careful. They would be evidence by themselves t Furness had retained possession of the ship; but taken with rest of the stipulations, they must be treated as inefficient l must be disregarded in a contract which is a giving up by rness and a giving over to the charterers for four months of the ole and absolute possession and control of the ship" : *per* rd Esher, M.R., *Baumvoll Manufactur Von Scheibler* v. *Gilchrest Co.*, [1892] 1 Q. B. 253, at pp. 256 and 257. And see also *per* rschell, L.C., *S. C. sub nom. Baumwoll, etc.* v. *Furness*, 893] A. C. 8, at p. 15.

Bill of lading.

So in a bill of lading providing for the transport of oranges from laga to England, a clause in print giving liberty to call at all diterranean ports in any order was confined to ports between laga and England : *Glynn* v. *Margetson*, [1893] A. C. 351; 62 J. Q. B. 466.

Words repugnant at law.

Of course the rule here stated, which is a rule of construction, quite different from the rule of law that words which are ugnant to an estate limited by the deed are void; some examples the latter rule are collected in Chapter XVI.

Omitted words supplied :—

Names of "grantor,"

The name of the grantor, which was omitted in the operative t of the deed, was supplied from the context in *Lord Say and l's Case* (1711), 10 Mod. 41, at p. 45; 4 Br. P. C. 73; *Trethewy Ellesdon* (1689), 2 Vent. 141; and *Dart* v. *Clayton* (1864), . R. 221; see *Mill* v. *Hill* (1852), 3 H. L. C. 828, at pp. 846 *eq.*; 88 R. R. 356.

"grantee";

"If A gives lands to have and to hold to B and his heirs, is good albeit the feoffee is not named in the premisses" : Litt. 7 a.

The name of the grantee omitted from the premises was supplied n the habendum in *Butler* v. *Dodton* (1579), Cary's Rep. in 86, and *Bustard* v. *Coulter* (1602), Cro. Eliz. 902, 917, in which , however, the point seems to have been admitted on the dings rather than decided, and in fact from the earlier report ems that the decision might have been the other way.

"obligor";

In a bond the christian name of the obligor, for which there a blank or blot, was supplied from the signature : *Dobson* v. *s* (1610), Cro. Jac. 261; and the name of one obligor was also plied : *Crosby* v. *Middleton* (1707), 3 Chan. R. 99.

"heirs";

The words "heirs" omitted in the limitation of a rent-charg was supplied from the power of distress: *Vernon* v. *Gatacre* (1566) Dy. 253 a.

"heirs of the body";

In a marriage settlement lands were limited to the use of th husband for life with remainder to the use of the first son of th body of the husband by the wife (without any words of limitation) and for default of such issue to the use of the second, third, an other sons of the body of the husband by the wife severally an successively according to seniority, and of the several heirs male o their several bodies; with divers remainders over. *Held*, the firs son of the husband by the wife born during his life took an estat tail: *Galley* v. *Barrington* (1824), 2 Bing. 387; 27 R. R. 663; an see *Giltrap* v. *Earl*, [1916] 1 Ir. R. Ch. 53.

In a marriage settlement lands were limited after life interests t the husband and wife, to the first and other sons of the marriag and their heirs successively in order of seniority, with remainder t all the daughters of the marriage and their heirs as tenants i common; there were no sons of the marriage, and the question wa whether the daughters of the marriage took estates tail or i fee simple. *Held*, that though the Court would construe th limitations to the sons as giving them estates tail, there was n necessity so to construe the limitations to the daughters, and the took estates in fee simple: *Doe* v. *Smeddle* (1818), 2 B. & Ald. 128 20 R. R. 377.

"of the body";

The words "of the body" were inserted in a settlement whereb lands were limited to A for life, remainder to trustees to preserve etc., remainder to B (A's eldest son) and the heirs of the said B and for default thereof to A's other sons and the heirs male of thei bodies successively with divers other remainders, so as to give I an estate tail only: *Wall* v. *Wright* (1837), 1 Dr. & Wal. 1; 5 R. R. 147.

"assigns";

The word "assigns" was inserted in a proviso for enablin either of the parties to a lease, "his executors or administrators" to determine it by notice to the other, his "heirs, executors, o administrators," so as to enable the devisee of the lessor t determine it: *Roe* v. *Hayley* (1810), 12 East, 464; 11 R. R. 455 Where the word "assigns" was omitted it was held that the wor "heirs" was used in its larger sense so as to include assigns *Cardigan* v. *Armitage* (1823), 2 B. & C. 197, 215.

"without issue";

The words "without issue" were supplied in a gift ove contained in marriage articles providing for the husband and wif and their children and containing a gift over on the death of th wife in the life of her husband: *Kentish* v. *Newman* (1713) 1 P. Wms. 234; *Targus* v. *Puget* (1751), 2 Ves. Sen. 194.

"or";

The word "or" was supplied in a proviso avoiding a grant "i

said Hester died unmarried having no issue of her body ully begotten," she having married but died without issue: *awke* v. *Chiggell* (1629), Cro. Car. 154; *S. C. sub nom. awke* v. *Chickell*, Sir Wm. Jones, 205, where the words of a iso are stated to have been "if she die before she is married has issue."

The condition of the bond being "to render a fair, just, and ect account in writing of all sums received." *Held*, that "to pay"; payment of the sums due on the account was a breach: *Bache roctor* (1780), 1 Doug. 382.

In a lease which contained a covenant by the lessor to supply "coal"; wood (*i.e.*, the refuse or smallest coal) and great chows (*i.e.*, ll pieces of coal) and panwood mixed, at certain rates, and a enant by the lessees not to purchase elsewhere panwood or coals ny kind so long as they were supplied at such rates, the word al" was inserted after "great," Lord Eldon saying, "It had n said that it was too strong to insert a word, but the answer that other words in the lease could not have their proper effect out it": *Wright* v. *Dicksons* (1813), 1 Dow, 141.

The word "hundred" was inserted between the words "one" "pounds" in a bond: *Waugh* v. *Bussell* (1814), 5 Taunt. 707; R. R. 624.

The word "pounds," which had been omitted in the obligation "pounds." n bond, was supplied: Lord Tenterden, C.J., saying, "The gatory part of the bond purports that the obligor is to become nd for 7,700. No species of money is mentioned. It must e been intended that he should become bound for some species oney. The question is, Whether from the other parts of the ument we can collect what was the species of money which party intended to bind himself to pay": *Coles* v. *Hulme* 8), 8 B. & C. 568; 7 L. J. (o.s.) K. B. 29; 32 R. R. 486. So in ll of sale the word "pounds" was inserted in a covenant for ment by instalments of "seven": *Mourmand* v. *Le Clair*, 3] 2 K. B. 216; 72 L. J. K. B. 496.

A father, P., by deed of February 22, 1836, appointed £5,000 "Stated to have been" is daughter O. for her separate use, with power to appoint, etc. he day following the daughter appointed £1,000 to her husband £4,000 to trustees upon trusts for the benefit of herself, her and and children. P. also made appointments of £5,000 to of his daughters E. and H. On November 22, 1842, P. by poll reciting that he had appointed £5,000 to each of E. and "and also the sum of £5,000 in favour of O.," appointed £5,000 . for life, remainder as to one-third to E., as to another third I., and the remaining third to "O. the wife of R. and her ren upon the trusts and subject to the same provisions as are

hereinbefore declared of and concerning the said sum of £5,0
hereinbefore appointed unto or for the benefit of the said C
wife of R., or as near thereto as the nature of circumstances w
admit." *Held*, that the deed must be construed as if the wor
"stated or mentioned to have been" had been inserted after t
words "as are hereinbefore," and as if the words "and h
children" had been omitted: *Hanbury* v. *Tyrell* (1856), 21 Bea
322; 111 R. R. 106.

"first son,"

Settlement on marriage of real estates for husband and wife f
life, remainder in tail for the first son of the husband begotten
the wife, remainder in tail for the second, third, and all and eve
the son and sons of the husband severally and successively
seniority of age and priority of birth (but not by the then co
templated marriage only, but by any marriage). There was
son of the husband by the then contemplated marriage, but
married again and had several sons. *Held*, that the eldest son
the husband by the second marriage took the first estate tail: *
Blake (1870), 18 W. R. 916; 19 W. R. 765.

"or being daughters attain 21,"

By a post-nuptial settlement reciting an intention to mal
further provision for the wife and the children of the marriag
certain sums of stock were settled on trust for the wife for life, a
after her death "in trust for all and every the child and childr
of the marriage who being a son or sons have or hath alread
attained or shall hereafter live to attain the age of twenty-o
years," as tenants in common and their respective executors, "a
if there shall be but one such child the whole shall be in trust f
such one or only child and *his* or *her* executors and administrators.
The maintenance clause spoke of "*his* or *her* maintenance, &c
until *his* or *her* share should be vested, or *he* or *she* previously die.
Held, that the words "or being a daughter or daughters sha
attain twenty-one," must be inserted in the trusts for children
Re Daniel's Settlement Trusts (1875), 1 Ch. D. 375; 45 L. J. C
105.

"or cesser of prior trusts."

Where personalty was settled upon trust for the wife for li
with remainder for the husband until he should become bankru
or until his death, which should first happen, and after the decea
of both husband and wife, upon trust for the children, the husba
became bankrupt during the wife's life, but was living at her deat
Held, that on her death the children took and that there was
resulting trust: *Re Akeroyd's Settlement*, [1893] 3 Ch. 363;
L. J. Ch. 32.

"Fee-simple" not inserted.

But the Court refused to supply as a matter of constructi
the word "simple" in a re-conveyance of freehold land, habendu
"to the use of the" mortgagor "in fee" freed and discharg
from the mortgage debt: *Ethel and Mitchell's and Butle*

tract, [1901] 1 Ch. 945; 70 L. J. Ch. 498. See also *Re Ford Ferguson's Contract*, [1906] 1 Ir. R. 607; and compare *Re ley's Estate*, [1910] 1 Ir. R. 1, and *Re Fayle and Feather Co.'s tract*, [1918] 1 Ir. R. 13.

Words transposed.

"It is not rare, say they, in our books that words shall be nsposed and marshalled so as the feoffment or grant may take ct. As if a man in the month of February make a lease for rs reserving a yearly rental payable at the feasts of St. Michael Archangel and the Annunciation of our Lady, during the term, law in this case of reservation shall make transposition of the ts, *viz.*, at the feasts of the Annunciation and of St. Michael, t the rent may be paid yearly during the term. And so it is in of a grant of an annuity": Co. Litt. 217 b. The cases rred to by Coke are *The Abbott of Osenay's Case*, Y. B. 10 v. 3 (1336), Mich. 43, pl. 4, and *Hill* v. *Grange* (1556), 1 Plow. , at p. 171.

Leases.

"The wisdom of the law useth to transpose words according to sense; and not so much to respect how the words do take place, how the acts, which are guided by those words, may take e"; and "The law will rather invert the words than pervert sense": Bacon's Law Tracts, Case of Revocation of Uses n. 1737), pp. 235, 236.

"Words shall be transposed to support the intent of the ies": Comyns' Digest, art. "Parols," A. 21.

Lease.

"If a man maketh a lease reserving rent, habendum for many s, so that the reservation is placed before the habendum, yet is good and the Judges by their construction are so to marshal words as to make it to be a reservation of the rent for the le term": *per* Coke, C.J., *Attoe* v. *Hemmings* (1614), 2 Bulstr. at p. 282.

Term read before estate tail.

Where in a marriage settlement a term for securing younger lren's portions was placed subsequent to the estates tail of the , it was helped in equity: *Uvedale* v. *Halfpenny* (1723), 2 Wms. 151; 2 Eq. Ca. Ab. 718, pl. 4; but probably this was se of rectification.

"The law is not nice in grants, and therefore it doth often spose words contrary to their order to bring them to the nt of the parties": *per* Willes, L.C.J., *Parkhurst* v. *Smith* 2), Willes, 327, at p. 332.

"Such" referred to a clause following as well as a clause preceding.

onveyance by marriage settlement to A, the intended husband, heirs and assigns, and in case A should die leaving one or son or sons on the body of his intended wife to be begotten, elder of such sons and the heirs male of his body being always rred to take place before the younger . . . with full liberty he said A "to make such reasonable provision as he should

think fit for *such* younger child or children," and in case the sai A should die leaving no son and that there should be one or mor daughters, then to such daughter or daughters if more than one on their attaining their respective ages of twenty-one years, the heirs and assigns, share and share alike. *Held*, that as th intention of the settlement was evidently to provide for all th children, as well daughters as sons, the Court would effect tha intention by transposing the clause creating the power and tha containing the limitation to the daughters, whereby the word "such younger child or children" would include both sons an daughters: *Fenton* v. *Fenton* (1837), 1 Dr. & Wal. 66.

Parenthesis inserted.

By the insertion of a parenthesis, or by punctuation, words o limitation have been annexed not only to the grants immediatel preceding, but to all the previous grants: *Doe* v. *Martin* (1790 4 T. R. 39; 2 R. R. 324; *Owen* v. *Smyth* (1796), 2 H. Bl. 594 3 R. R. 513; *Galley* v. *Barrington* (1824), 2 Bing. 387; 27 R. R 663; 10 J. B. Moore, 21; *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. War. 1; 59 R. R. 617; *Re Denny's Estate* (1874), Ir. R. 8 Eq 427; and compare *Langston* v. *Langston* (1834), 2 Cl. & F. 194 37 R. R. 57 (a case on a will).

Parenthesis.

Marks of parenthesis are not to be regarded as diminishing th effect of the words included between them, *Gascoigne* v. *Bark* (1743), 3 Atk. 9 (a case on a will), where, however, at p. 1 Hardwicke, L.C., says: "I have a doubt whether in the case o grants the construction is more strict than in wills, for if a ma grants to another such and such houses in the occupation of A and C and afterwards excepts the house in the occupation of B th exception is void, because they will rather reject the subsequen exception entirely than the grant itself should be void."

Punctuation.

In *Sanford* v. *Raikes* (1816), 1 Mer. 646 (also a case on a will Sir Wm. Grant, M.R., at p. 651, says: "It is from the word and from the context, not from the punctuation, that the sen must be collected."

In a marriage settlement the trusts were to pay the income certain funds to Mrs. Tunstall *for her separate use during h coverture*, and in case she should die in the lifetime of her husban then to him for life, and after the death of the survivor to ho the capital upon trust for the issue. *Held*, that the words in itali could be read as in a parenthesis, so as to give Mrs. T. a li interest by implication: *Tunstall* v. *Trappes* (1829), 3 Sim. 286, p. 312. *Re Stanley's Settlement*, [1916] 2 Ch. 50; 85 L. J. Ch. 80

False Latin.

Nota q̃ fuit dit p. Vavisor in m̃ le ple ut sup. q̃ si faux Lat soit en un br̃, sicōe le br̃ est et habeas ibi hac breve ou il ser̃ h breve le br̃ abat̃ & ne ser̃ amend' p̃ c̃ q̃ il poit av̄ meliour br̃. M aut̃ ẽ ou faux Latin est in un obl' ou record ou in un ple; in ce

es il ser̄ amend' p̄ c̄ q̄ il ne poit av aut obligation ou rec̄ ou aut : Y. B. 9 Hen. 7 (1493), 16 b.

False grammar.

"*Falsa grammatica non vitiat concessionem: item, ille numerus* ensus *abbreviationum accipiendus est ut concessio non sit inanis.* d therefore if the King grants *tot' ill' maner' de D. et C.* if it is one manor in truth, then these abbreviations of *tot' ill' maner'* ll be taken in the singular number *totum illud manerium* : and hey are in truth two distinct manors, then these abbreviations ll be taken in the plural number *tota illa maneria*, or otherwise grant will be void. . . . So in the conusance of a fine, false tin or incongruity shall not hurt the fine": *The Earl of ewsbury's Case* (1610), 9 Rep. 42, at p. 48 a.

"Si obligation ad incongrue Latyn uncore c'est bon": Bro. r., Obligation, 71; *Jas. Osborn's Case* (1613), 10 Rep. 130, at 133 a.

"Neither is it necessary, that the English or Latin, whereby a d is made, be true and congruous; for false and incongruous tin or English seldom or never hurteth a deed : for the rules are, *lsa orthographia non vitiat chartam. Falsa grammatica non iat concessionem*": Shep. Touch. 55.

"It is a rule of law, *mala grammatica non vitiat chartam*, ther false Latin nor false English will make a deed void when intent of the parties doth plainly appear. It is therefore held t two negatives do not make an affirmative when the apparent ent is contrary. And it is another rule of law *falsa orthographia vitiat concessionem*": Shep. Touch. 87.

"It is but false Latin, which shall not make void a bond": *pson* v. *Keys* (1610), Cro. Jac. 261.

"For neither false Latin nor false English will make a deed void he intent of the parties doth plainly appear": *per* Willes, .J., *Parkhurst* v. *Smith* (1742), Willes, 327, at p. 332.

Bonds.

Debt on a bond conditioned to pay £7 by 2s. a week till the £7 paid, and if he failed of the payment of the 2s. at any of the s wherein it ought to be paid, the obligation to be void or else emain in full force. The obligor omitted to make the payment he 2s. on one of the days on which it ought to be paid. *Held*, the condition might be read distributively, by referring iculars to particulars, *viz.*, that if he paid the £7 the obligation ld be void : but if he failed of paying the 2s. at any of the s, it should remain in force : *Vernon* v. *Alsop* (1662), 1 Lev. 2 Danv. Abr. 25. From the reports of this case in 1 Keb. 356, 451; Sir T. Raym. 68; 1 Sidf. 105, it appears the decision that the condition was repugnant and void. The decision as ed in the report in Levinz was followed in *Wells* v. *Wright* 8), 2 Mod. 285.

A bond is made—" Know all men that I Philip Goole do star bound " (*not said to whom*) " in the sum of £16, and is to be pa to the said John Garnes the elder's executors; for which payme to be made I do bind me, my heirs and executors " (*but not sa to whom*). The condition, after long and senseless recitals, was " If therefore Philip Goole shall pay to John Garnes the elder executors within one year after his death, the bond shall be void. *Held*, that either the words " John Garnes the elder's executors should be disjoined and be read " John Garnes the elder h executors " and to be taken " John Garnes the elder and h executors," or that the words " the elder's executors " should b wholly rejected as void, and the words be read " to be paid to Joh Garnes " only : *Langdon* v. *Goole* (1681), 3 Lev. 21.

" Thereon " not referred to last antecedent;

In a deed of partnership it was provided that the capital of deceased partner as at the last balance should be paid out to h representatives by instalments of equal amount at six, etc., month date from the date of the surviving partners declaring the election to continue the business, " with interest thereon from th date of the last balance." *Held*, that " thereon " was referab not to the last antecedent " instalment," but meant on the balan of capital for the time being remaining unpaid : *Ewing* v. *Ewin* (1882), 8 Ap. Ca. 822.

" hereinafter ";

On the other hand, where in a lease after divers lessee covenants there was contained a proviso for re-entry on no payment of rent or on breach of " any of the covenants *hereinaft* contained on the part of the lessee," and there were no covenan by the lessee after such proviso, but only a covenant by the less for quiet enjoyment on payment of rent and the performance " the covenants *hereinbefore* contained," it was held that " herein after " could not be read " hereinbefore " in the proviso : *Doe* v *Godwin* (1815), 4 M. & S. 265; but *quaere* whether this case woul now be followed. Lord Ellenborough, C.J., seems to have put h decision on the ground that if the plaintiff had declared upon th lease and set it out without the word ' hereinafter ' and substitutin therefor ' hereinbefore,' he would have been non-suited on a plea *non est factum*, which hardly seems to be a satisfactory reason f the decision.

" herein."

Where a debenture contained a proviso that nothing " herein contained should prevent the creation of specific mortgages up after-acquired freehold or leasehold property, it was held that th word " herein " must be read as equivalent to " in this debenture and that the proviso could not control or qualify the securit created by the trust deed : *Wilson* v. *Kelland*, [1910] 2 Ch. 30 79 L. J. Ch. 580.

Incorrect spelling.

ncorrect spelling is often disregarded. Thus—

' Wiginti " was read as " viginti " : Y. B. 9 Hen. 6 (1431), 7 a.

n a patent of Henry VII the initial letters of the first four ls of the King's style and title were omitted and spaces left them (it having been intended that these letters should be orately engrossed after the rest of the document had been ten), nevertheless it was held that the patent was good without ndment or rectification in Chancery: *Digby* v. *Mountford* 4), Dy. 342 a, pl. 53.

' Septuagentis " was read as " septingentis " : *Walter* v. *Pigot* 2), Cro. Eliz. 896; Moore, 645; *S. C. sub nom. Walter* v. *ot*, Hob. 116, where the word is given as " septuagint'."

' Nobulis " was read as " nobilibus " : *Mathew* v. *Purchins* or *ching* v. *Vaughan* (1607), Cro. Jac. 203.

' Sexingentis " was read as " sexcentis " : *Anon.* (1607), 2 Roll. . 147, pl. 11.

' Sessanta " was read as " sexaginta " : *Parker* v. *Keneday* 8), Hob. 19; 1 Brownl. & G. 62; and *S. C. sub nom. Parker Rennaday*, Cro. Jac. 308, where the word is given as ssanta "; in some of the reports it is stated that the bond was talian.

' Tenerie et obligarie " was read as " teneri et obligari " : *son* v. *Kayes* (1610), Yelv. 193; *S. C. sub nom. Dodson* v. *es*, 1 Brownl. & G. 110.

' Quinquagesimis " was read as " quinquaginta " : *Ells* v. *Clark* 1), Cro. Jac. 290.

' Trigintata " was read as " triginta " in *Loggin* v. *Tetherton* 1), Hobb. 18; " trigintate " as " triginta," in *Biggins* v. *erton* (1612), Cro. Jac. 309; but " trigintatae " was not read ' triginta " in *Loggins* v. *Titherton* (1612), Yelv. 225; but gintate " was read as " triginta " in *Higgens* v. *Totherden* 4), Cro. Jac. 355. (These four cases appear to be the same in different stages, and if so the last decision that the word l be read as " triginta " must be accepted as correct.)

Octaginta," " septungenta," and " sewtene " were respec- y read as " octoginta," " septingentis," and " seventeen " in cited in *Jas. Osborn's Case* (1613), 10 Rep. 130, at p. 133 a.

Sexigintis " was read as " sexaginta " : *Marsham* v. *Jolley* 4), 2 Bulstr. 241; *S. C. sub nom. Jolley* v. *Masham*, 1 Roll. 47; 2 Roll. Abr. 147, pl. 10; *sub nom. Masdame* v. *Jolly*, 20.

Octagesimo " read as " octoginta " : *Vernon* v. *Onslow* (1614), ownl. & G. 60; Moore, 864; Hob. 75.

Triginti " read as " triginta " : *Taylor* v. *Thorpe* (1619), ll. Ab. 146, pl. 5.

"Threty-two ponds" read as "thirty-two pounds": *Hulbe* v. *Long* (1620), Cro. Jac. 607.

"Octoginta et terdecem annos" was read as "octoginta tresdecem annos": *Hopehill* v. *Searle* (1634), Cro. Car. 386.

"Joaem," without any dash or prick over it, was read as a abbreviation for "Johannem," and "quinginta" as "quinqu ginta": *Downs* v. *Hathwait* (1635), Cro. Car. 418.

A testator made his will, writing "I make 'A. B.' my sol ayeare and my yexecutor." *Held*, that this operated as if he ha written "heir" and "executor": *Tayler* v. *Webb* (1651), Sty 301, 307, 319.

In Chancery, Nottingham, L.C., aided a mistake of "qua raginta" for "quadringentis," where the bond was to secu payment of £200: *Sims* v. *Urry* (1676), 2 Cha. Ca. 225.

"Nongint' et octogessimis" read as "nongentis et octoginta" *Rossell* v. *Rossell* (1687), Lut. 422; Nel. Lut. 127.

"Tricesimo secundo" read as "triginta duobus": *Dennis* *Snape* (1687), Comb. 60.

"Quadrans" read as "quadraginta": *Cromwell* v. *Grunsd* (1698), 2 Salk. 462; 1 Ld. Raym. 335; Holt, 502; *S. C. sub no Cromwell* v. *Grimsdale*, Comb. 477; *sub nom. Cromwell* *Grumsdale*, 12 Mod. 193.

Most of these cases were cases of bonds conditioned for t payment of money, and the intention of the parties was ma apparent by the condition.

Bonds held void.

In the following cases, where bad spelling was apparently he to avoid the deed, the real decision probably was, that t declaration having altered the word, differed from the deed, a hence enabled a plea of *non est factum* to prevail.

"Octigent" was not read as "octoginta": *Fitzhughes' Ca* (1561), Hob. 19.

"Liveris" was not read as "libris": *Anon.*, cited *Durchin* *Vaghan* (1607), 2 Roll. Abr. 146, pl. 6.

"Sexaginta" not read as "sexcenta": *Gregg* v. *J. S.* (160 Cro. Jac. 190.

"Sexgintis" not read as "sexcentis": *Gerry* v. *Davis* (160 Yelv. 105.

"Quemquegentis" not read as "quingentis": *Parry* v. *D* (1606), Cro. Jac. 146; Yelv. 95, where the word is given "quimquegent'"; on appeal (1616), Hob. 119, where the wo is given as "quinquegintis." Hobart states that the case w compromised in the Exchequer Chamber by the mediation of t Judges; that he and most of the Judges thought it good, but t Chief Baron, who had been party to the decision in the King Bench, "stuck." A bond for "terengentate liberis" was he

l : *Hills* v. *Cooper* (1620), Cro. Jac. 603, in which case was cited *trose's Case*, where a bond for twenty "literis" was held void, not read as one for twenty "libris." In the two latter cases eems that the judgment was that the bonds were void and not ely that the plea of *non est factum* succeeded.

Where the plaintiff declared for "quadraginta" pounds, and bond was for "quadragenta," it was held to be a material iance : *Fielder* v. *Tovy* (1651), Styl. 241, 257.

Where the plaintiff declared for £50 and the bond was for uantogint'" pounds, the defendant had judgment on demurrer : *ange* v. *Greenhill* (1677), Sir T. Jones, 48.

CHAPTER VI.

AMBIGUITIES—EQUIVOCATIONS—INACCURACIES.

Ambiguities (Patent and Latent) and Inaccuracies Defined an Distinguished: Deed void for Uncertainty: No Evidence o Intention to Explain Patent Ambiguity: Evidence of Use Admissible to Explain Ambiguity, Patent or Latent: Ambiguit determined by Election: Equivocations: Direct Evidence o Intention to determine Equivocation: General joined wit Particular Statement: No part of Description applicable: Par only of Description applicable: Part of Description applicabl to One, Part to Another, object.

MUCH confusion exists, even in judicial decisions, between th different kinds of ambiguity, and between ambiguities an inaccurate descriptions.

Ambiguities.

There are two kinds of ambiguity :—

Patent ambiguity.

First, where the ambiguity arises from the fact that the partie have expressed inconsistent intentions on the face of the deed.

An ambiguity of this class is apparent to any person perusin the deed, even if he be unacquainted with the circumstances of th parties and is called a "patent ambiguity."

Latent ambiguity or equivocation.

Second, where no ambiguity is apparent on perusal of the deed to a person unacquainted with the circumstances of the parties, bu after evidence of the circumstances of the parties is obtained, it i discovered that there are several persons or things, or classes o persons or things, to each of which a name or description containe in the deed seems to be equally applicable.

An ambiguity of this class is called a "latent ambiguity" or a "equivocation."

Inaccurate description.

An inaccurate description is one that does not exactly fit an person or thing, or class of persons or things.

A grant of "my house" to "the son of A" appear unambiguous, and it is not till it appears from extrinsic evidenc that the grantor has two houses or that A has two sons, that th equivocation becomes manifest.

Ambiguities arising from

It may be remarked that many words bear more than on meaning, and as no man can know all the possible meanings o

y word in the language, it may happen that while the ies to a deed think that they have expressed their intentions in unambiguous manner, the language appears to be ambiguous person who is aware that some of the words are capable of e than one meaning.

words bearing more than one meaning.

Ambiguities arising solely from the fact that the words are able of more than one meaning (a class which, it will be erved, includes equivocations) are sometimes called "latent iguities," while at other times that phrase is restricted to vocations, as above defined. To avoid confusion the term uivocation" is herein always applied to a description which as to be equally applicable to more than one person or thing, lass of persons or things, where only one is intended.

Equivocations.

It should perhaps be remarked that a description may be vocal without being inaccurate, and may be inaccurate without g equivocal. If A has two freehold houses in London the ase "A's freehold house in London" is equivocal, but it is not curate. The description fits each house, though it does not inguish between them. On the other hand, if A's only house London is leasehold, the description, "A's freehold house in don," is inaccurate, but not equivocal.

Inaccurate distinguished from equivocal description.

Where a *patent* ambiguity exists, the grantor appears to be ing between two intentions; *e.g.*, "I grant my house to my new John or Thomas"; a limitation "to one of the sons of A." each of these cases the grantor has given a correct description he object of his bounty, but he has not stated clearly whether n or Thomas, or which of the sons of A is to be that object. n evidence as is admissible under the preceding rules might that John and Thomas denoted the same person, or that A only one son, and that that fact was known to the grantor (see ram, Extr. Ev. (5th ed.), p. 73, pl. 79); in which case the iguity would disappear; but if this is not the case, if the iguity remains after the application of such evidence, the tor has expressed no intention that can be ascertained. Similar rks apply to the case where the ambiguity occurs in the ect-matter of the gift. These considerations give rise to the wing rule :—

Patent ambiguities.

Where after the application of extrinsic evidence to determine the literal meaning of the words used, and of intrinsic evidence to determine in what secondary meaning, if any, they are employed, a patent ambiguity remains as to the person or thing intended, or as to what is to be

Deed containing patent ambiguity void for uncertainty.

done, the intention of the parties cannot b ascertained, or, as the rule is commonly expresse the deed or clause is void for uncertainty.

"If one grant to one of the children of J. S., and J. S. ha more than one, and he do not describe which he doth intend, th grant is void for incertainty": Shep. Touch. 251; *Paston Genney*, Y. B. 11 Edw. 4 (1471), 2 a.

Leases.

Lease dated October 10, habendum "from the 20th day November, for five years." *Held*, void for the uncertainty wh November is meant: *Anon.* (1673), 1 Mod. 180. But a lease fro the feast of Our Lady, *Held* good by election: *Anon.* (1590 1 Leon. 227, ca. cccviii. Agreement for sale of land, "the vend reserves the necessary land for making a railway through the esta to P." *Held*, void for the uncertainty: *Pearce* v. *Watts* (1875 L. R. 20 Eq. 492; 44 L. J. Ch. 492; cf. *South Eastern Railway Associated Portland Cement Manufacturers* (1900), *Ltd.*, [1910 1 Ch. 12; 79 L. J. Ch. 150. But where A purchased an estat having ageed with B that if it were purchased B should have a pa of it, as to which there was some uncertainty, a reference Chambers was directed to ascertain what such part was: *Chatto* v. *Muller* (1878), 8 Ch. D. 177.

Where a lessor of mines reserved power to work mines n included in the lease, with a proviso that in exercising such powe the working of the mines demised should not be unnecessari interfered with, such proviso was held void for uncertainty: *Mund* v. *Duke of Rutland* (1883), 23 Ch. D. 81.

Evidence of intention not admissible to explain patent ambiguity.

No direct evidence of intention is admissible t explain a patent ambiguity.

This rule follows from the principles above laid down, but appears convenient to state it expressly, so as to contrast pate ambiguities with equivocations.

"*Ambiguitas patens*" (*i.e.*, an ambiguity apparent on the dee or instrument) "is never holpen by averment" (*i.e.*, by offerin direct evidence of intention); "and the reason is, because the la will not couple and mingle matter of specialty, which is of th higher account, with matter of averment, which is of inferi account in law; for that were to make all deeds hollow, and subje to averments, and so in effect, that to pass without deed, which th law appointeth shall not pass but by deed. . . . It holdet generally that all ambiguity of words by matter within the dee and not out of the deed, shall be holpen by construction, or some cases by election, but never by averment, but rather sh

e the deed void for uncertainty" : Bac. Elem. Rule 23; Bac. Tracts (ed. 1737), p. 99.

One of J. S.'s sons.

If a man by deed gives goods to one of the sons of J. S., who divers sons, here he shall not aver" (*i.e.*, offer direct evidence tention) "which son he intended, for by judgment in law upon deed, this gift is void for the uncertainty, which cannot be lied by averment—*vide Paston* v. *Genney*, Y. B. 11 Edw. 4 1), 2 a. . . . Where the words are in the limitation of the e to two *et haeredibus*, that is apparent in the fine, and by ment of law these words *et haeredibus* are uncertain and void" ause it does not appear whose heirs are meant), "and no ment *dehors* can make that good, which upon consideration of deed is apparent to be void" : *Altham's Case* (1610), 8 Rep. b, at p. 155 a. (To understand this it should be remembered a gift to one man *et haeredibus* omitting *suis*, followed by y, gave him a fee simple : Co. Litt. 8 b.)

Figures and words discrepant.

An action was brought on a bill of exchange expressed in figures e drawn for a different sum from that expressed in words. lence of the intention of the parties as to the sum for which it drawn was rejected, Tindal, C.J., saying : "This is a case of *iguitas patens*, and, according to the rules of law, evidence to ain such an ambiguity is not admissible. Where there is ot on the face of the instrument the law admits no extrinsic ence to explain it" : *Saunderson* v. *Piper* (1839), 5 Bing. N. C. at p. 431; 8 L. J. C. P. 227; 50 R. R. 731. By trinsic evidence," the Judge meant "direct evidence of ntion."

Evidence of user admissible to explain ambiguity.

Evidence of user under an instrument containing an ambiguity, ther patent or latent, may be given in order to show the sense hich the parties interpreted the language of the instrument, and whether the instrument is a modern or an ancient one : *cham* v. *East Africa Protectorate*, [1919] A. C. 533; 87 L. J. . 150.

Ambiguity in subject-matter determined by election.

In some cases an ambiguity, as to the subject-matter, or the estate granted, may be determined by the election of one of the parties.

When to be made during life.

The rules as to election are given in Co. Litt. 145 a as follows : te as to election these diversities following. First, when ing passeth to the feoffee or grantee before election to have the thing or the other, there the election ought to be made in the of the parties, and the heir or executor cannot make election. when an estate or interest passes immediately to the feoffee, e, or grantee, there election may be made by them, or by their

heirs or executors. Secondly, when one and the same thin passeth to the donee or grantee, and the donee or grantee hat election in what manner or degree he will take this, there th interest passeth immediately, and the partie his heires or executor may make election when they will. Thirdly, when election i given to severall persons, there the first election made by any of th persons shall stand. Fourthly, in case an election be given of tw severall things alwaies he, which is the first agent, and whic ought to do the first act, shall have the election. As if a ma granteth a rent of twenty shillings or a robe to one and to hi heires, the grantor shall have the election, for he is the first agen by payment of the one, or deliverie of the other. So if a ma maketh a lease rendering a rent or a robe, the lessee shall have th election *causa qua supra*. But if I give unto you one of my horse in my stable, there you shall have the election; for you shall b the first agent by taking or seisure of one of them. And if on grant to another twentie loads of hazill or twentie loads of mapl to be taken in his wood of D there the grantee shall have election for he ought to do the first act, *scil.* to fell and take the same Fifthly, when the thing granted is of things annual, and are t have continuance there the election remaineth to the grantor (i case where the law giveth to him election) as well after the day, a before. Otherwise it is when the things are to be performed *unica vice*. And therefore if I grant to another for life an annuiti or a robe at the feast of Easter, and both are behind, the grante ought to bring his writ of annuitie in the disjunctive; for if h brings his writ of annuitie for the one onely, and recover, thi judgment shall determine his" (but *quaere* this is a mistake fo "the" or "my") "election for ever; for he shall never have writ of annuitie afterwards, but a *scire facias* upon the sai judgment. Which reason, Fitzherbert, in his Natura Brevium, no observing, held an opinion to the contrarie (see F. N. B. 152, G) But if I contract with you to pay unto you twentie shillings or robe at the feast of Easter, after the feast you may bring an actio of debt for the one or for the other. Sixthly, the feoffee by hi act and wrong may lose his election, and give the same to th feoffor. As if one infeoffe another of two acres, to have and t hold the one for life, and the other in taile, and he before electio maketh a feoffment of both: in this case, the feoffor shall ente into which of them he will, for the act and wrong of the feoffee. To which Butler adds as a note: "But if the grant be to hold on acre for life and the other in fee and donee makes feoffmen of one acre only, it is an election to have the fee of that and this being lawful nothing is forfeited." The rules are als stated in *Sir Roland Heyward's Case* (1595), 2 Rep. 36 b.

Who has election.

Recurrent election.

Election lost.

Grant in disjunctive.

' If one grant to me a rent or a robe; twenty shillings or forty ings; or common of pasture or rent; in the disjunctive, which ; first very incertain; yet this grant may become good; for if ake my election, or he pay the rent, or perform the grant in er part, the grant is now become good. . . . So it is when a hath six horses in his stable, and he doth grant me one of his es, but doth not say which of them; in this case I may choose h I will have; and in these cases, when I have made my ion, and not before, the grant is good. And if in these cases, grantee doth not make his election during his life [and also life of the grantor: Co. Litt. 145 a], it seems the grant will r be good": Shep. Touch. 251.

Land of so much value.

Fine, feoffment, and recovery of land, part of a manor, to a in annual value. *Held*, good by election of *cestui que use*: *hrop's Case* (1574), Moore, 101; Dyer, 334 b, pl. 33.

120 acres in a waste.

Where a grant is general, as the moiety of a yardland or 120 s in a certain waste, without certainty in what part of the e the grantee shall have the land, or the special name of the , or how it is bounded, and without any certain description of he grant may be made good by the election of the grantee, e grantor be a common person, but not if he be the Crown, which case the grant is altogether void: *Hungerford's Case* 5), 1 Leon. 30; *Brand* v. *Todd* (1618), Noy, 29; and see Bacon, n. Rule 23; Bacon's Law Tracts (ed. 1737), p. 99.

One yardland.

Where a father settled five yardlands to himself for life, with inder to the use of his eldest son and his wife Grace and the of the body of his son, with a proviso that if his son preased him the wife should have one yardland and a half for life ossession, without saying which particular yardland and one it was held that the life estate of the father ceased on the death, and that the latter's wife could elect which land she d take: *Marshal* v. *Marshal* (1598), Moore, 602.

No feoffment made good by election.

ut it must be pointed out that *livery of seisin* cannot be made uncertain area of land, and, therefore, a *feoffment* of land of tain value is void and cannot be made effectual by election, thus if a man covenant by indenture to make a feoffment of of the value of fifty marks and then makes feoffment of all ands to the use of the indenture generally, and does not set he land, only the actual place where the livery is made, and and of the value of fifty marks will pass; for the setting out be made before, or at the actual time of, the livery: *lhouse* v. *Futter* (1615), 1 Roll. Rep. 187; *S. C. sub nom.* *r* v. *Woodhouse* (1595), Dyer, 281a, n.

nd a feoffment of seventeen acres, part of a larger wood, was void in *Bullock* v. *Burdot* (1565), 1 And. 111; *S. C. sub nom.*

Bullock v. *Burdet* (1565), Moore, 81; *sub nom. Bullock* v. *Burdet* (1568), Dyer, 280 a, pl. 17.

Freehold *in futuro.*

"If then by a deed there had been a grant" (*i.e.*, to take effec immediately) "of a plot of land to be ascertained by election, i follows that until the election nothing passed, and if the dee granted certain specified lands with the exception of a plot to b ascertained by election, it seems to us that the deed would at onc pass the whole, but subject to an exception which could only b ascertained and take effect when the election was made": *pe* Stirling, L.J., *Savill, Bros., Ltd.* v. *Bethell*, [1902] 2 Ch. 528 at p. 539; 71 L. J. Ch. 652.

It follows that if the deed operates at Common Law any suc grant or exception will be void as purporting to create a freehol *in futuro*, and that if it operates under the Statute of Uses it wi be void as infringing the rule against perpetuities, unless th election must be made within the time limited by that rule: *Bulloc* v. *Burdett* (1567), Dyer 281 a; Moore, 81; 1 And. 111; *Savill Bros. Ltd.* v. *Bethell* (*supra*); see also *Sharpe* v. *Durrant* (1911) 55 S. J. 423.

The following are examples of Coke's fourth rule—

Examples of fourth rule.

If I give to a man my cow or my horse he can take either at hi election, but if I promise to give him a cow or a horse at a futur time, it is in my election to give him which I chose: Y. B 21 Hen. VII. (1506), 18 B.

"If I give you one of my horses, although that be uncertain, ye by your election that may be made a good gift": *Mervyn* v. *Lyd* (1554), Dy. 90 a, at p. 91 a.

A covenant by A with B that B should have the marriage c one of A's daughters. A has the election which daughter B ca dispose of in marriage: *Anon.* (1564), Moore, 72, pl. 197.

All except some.

The grantor has an election when the grant is of all except some *Sir Thomas Lee's Case* (1578), 1 Leon. 268, where the grantc aliened his manor except one close called Newdick, and ther were two closes so called; *Billingsly* v. *Hersey* (1611), 2 Bul. 5 at pp. 6 *et seq.*, where a lease was granted of all trees except si great trees.

Agreement by an incumbent to grant a lease at a future time c his glebe, "except thirty-seven acres thereof," which were nc specified. *Held*, that the contract was not void, as the right c selecting belonged to the lessor, he having the first act to do *Jenkins* v. *Green* (1858), 27 Beav. 437; 28 L. J. Ch. 817; 12 R. R. 479.

Heirs or executors.

If a mortgage debt is made payable to the mortgagee, his heir or executors, and he die before the day appointed for payment, th

gagor may, if he pay on that day, pay either to the heir or executor : Co. Litt. 210 a.

Lease.

ease for years to begin at the feast of Our Lady, without ng at which feast, the lessee may determine the beginning of term at his election : *Anon.* (1590), 1 Leon. 227, ca. cccviii; a lease from November 20 was held void for uncertainty; *n.* (1673), 1 Mod. 180.

Term uncertain.

agreement for lease for seven, fourteen, or twenty-one years, or habendum for seven, fourteen, or twenty-one years, is not , but gives an option to the lessee to determine the lease at end of the first seven years or fourteen years : *Dann* v. *Spurrier* 3), 3 Bos. & P. 339, 442; 7 R. R. 797; *Doe* v. *Dixon* (1807), st, 15; 9 R. R. 501; *Price* v. *Dyer* (1810), 17 Ves. 356; *Powell mith* (1872), L. R. 14 Eq. 85; 41 L. J. Ch. 734.

demise "for two years certain and thereafter from year to until either party" gives a three months' notice to determine, tenancy for three years at least and only determinable by a e expiring at the end of the third or any subsequent year : *Searle*, [1912] 1 Ch. 610; 81 L. J. Ch. 375; and a tenancy ement providing that "the tenancy shall commence on ember 1, 1918, to continue from year to year until determined hree calendar months' notice to quit, which may be given on r side and at any time" was held to create a yearly tenancy a notice which would expire before the termination of the year was bad : *Mayo* v. *Joyce*, [1920] 1 K. B. 824; 89 L. J. 3. 561. See also *Soames* v. *Nicholson*, [1902] 1 K. B. 157; . J. K. B. 24.

ther examples will be found in 1 Roll. Ab. 725, "Election"; Abr. "Election," B. C.

n election made by tossing or lot is good : *Duckmanton* v. *cmanton* (1860), 5 H. & N. 219; 29 L. J. Ex. 152; 120 R. R.

No election against King.

ut a grantee from the King has no right of election : *Sir er Hungerford's Case* (1585), 1 Leon. 30. If the King grant cres of his waste in D., and the waste contains 300 acres, there ng passes, for it is uncertain which 120 acres were intended, he party shall not have any election against the King : *Brand odd* (1618), Noy, 29. But in a case where lands were fectly described in Crown grants by the Governor of New Wales, and such grants were impeached as void for tainty, the grants were upheld, the grantee having been in ssion for more than thirty years and paid quit rents to the : *Doe* v. *Wilson* (1855), 10 Moo. P. C. 502; 110 R. R. 83.

Equivocations.

equivocation is not discovered till the person perusing the finds by extrinsic evidence as to the literal meaning of the

words employed that the description is equally applicable to mo than one person or thing, or class of persons or things.

Either extrinsic or intrinsic evidence may be adduced for t purpose of determining the meaning of the words and clearing the *prima facie* equivocation, but if it should happen that su evidence is insufficient to resolve the equivocation, there is liber to resort to extrinsic evidence for that purpose; but such extrins evidence differs in its nature from that already discussed: evidence of what was passing in the minds of the parties at t time of executing the deed is not admissible for the purpose determining the literal meaning of the words used, but is admissib to determine in which of the several literal meanings of the wor used in an equivocation they were employed; it follows, therefor that—

Direct evidence of intention.

Direct evidence of intention to resolve equivocation.

> When after all the extrinsic and intrins evidence admissible under the preceding rules h been exhausted, a name or description still remai equivocal—*then, and not till then*—extrinsic ev dence of what was passing in the minds of th parties to the deed at the time of execution admissible for the purpose of determining which the several persons or things, or classes of perso or things, described by the equivocation the parti intended, and for no other purpose whatsoever.

Evidence of the nature mentioned in this rule may be calle "direct evidence of intention": it may be defined as "evidence prove intention itself as an independent fact."

Nature of such evidence.

Direct evidence of intention is entirely different in its natu from evidence used to determine the literal meaning of a wor It will be remembered that evidence of the latter nature is adduc for any of the purposes following, *viz.*: to show (1) the meani *usually* affixed to the word at the time of execution of the deed b persons of the class to which the parties belong; or (2) th meaning in which the word must have been used by the parti having regard to their circumstances at the time of execution; (3) the meaning which it can be conclusively shown that the parti were in the habit of affixing to the word. On the other han direct evidence of intention is evidence as to which of sever persons or things, or classes of persons or things was *on the speci occasion of framing the deed* intended by a description, whic when interpreted with the aid of evidence as to the literal meani of the word and as construed by the context, appears to be equal applicable to any one of them.

Vhere Judges or text writers speak of applying "verbal" or rol" evidence to the explanation of ambiguities or inaccuracies, generally mean direct evidence of intention; but since the se "parol evidence" may mean evidence as to the literal ning of the words, there is a certain amount of confusion in the of the Judges and authors, against which the reader must be is guard. For instance, *dicta* will be found to the effect that rol evidence" is not admissible to clear up a patent ambiguity n inaccuracy, where all that is meant is that direct evidence of ition is not admissible for that purpose; and it is not intended eny the admissibility of parol evidence to ascertain the literal ning of the words employed.

Verbal or parol evidence.

t will be observed that this rule is not, as may at first sight ar, an exception to the rule against the admission of evidence ld to, contradict, or vary the terms of the deed. "In the case quivocation, the general intent includes both the special, and *efore stands with the words*": Bacon, Elem., Rule 23; Bac. Tracts, p. 101. The person or thing intended is completely correctly described, though the description applies also to her person or thing; while the rule against the admission of ence to add to, contradict, or vary the terms of a deed, tives the contention that, as the deed does not completely or ctly express the intention of the parties, therefore the expressed tion ought to be disregarded or supplemented on parol evidence nexpressed intentions.

Direct evidence of intention is in support of the express words.

If a man has two sons both baptized by the name of John, conceiving that the elder (who had been long absent), is dead, es his land by his will in writing to his son John generally, n truth the elder is living; in this case the younger son may eading or in evidence allege the devise to him; and if it be d, he may produce witnesses to prove his father's intent, that ought the other to be dead" (*i.e.*, that the literal meaning of , was John the younger), "or that he at the time of the will , named his son John the younger" (*i.e.*, may adduce direct nce of intention that John the younger was meant), "and the left out the addition of the younger; for in Y. B. dw. 3 (1373), 16 b, the case was: Robert Peynel had issue ons baptized by the name of William, and levied a fine to ohn Fanningbridges and others *come ceo*, &c., who granted endered to Robert and William his son generally; and after ath of Robert, William the younger son brought a *scire facias* t the heir of William the elder; and the younger by the rule Court averred that the fine was levied to make him heir, &c., and upon that, issue was taken. And no inconvenience se if an averment in such case be taken in case of a devise

Two sons of same name.

by will, for he who sees such will, whereby land is devised to hi son John, cannot be deceived by any secret invisible averment for when he sees the devise to his son John, he ought at his per to inquire which John the testator intended, which may be easil known by him who wrote the will, and others who were privy t his intent; and if no direct proof can be made of his intent, the the devise is void for the incertainty, as the render also would b in the said case of the fine as to William" : *Lord Cheyney's Cas* (1591), 5 Rep. 68, at p. 68 b.

Two manors of same name.

"If a man levies a fine of the manor of Soure or of the mano of Dirtleby . . . and in truth there is the manor of North Sour and South Soure, of Great Dirtleby and Little Dirtleby, in thi case issue may be taken *dehors*, which manor the conusor intende to pass, for that is matter of fact not apparent in the fine, where the Judge cannot take conusance; but it stands well with the fine and shall be tried by the jury, and therewith agree *Haliwel* v *Courtney*, Y. B. 12 Hen. 7 (1496), 6 b; Y. B. 26 Hen. 8 (1534) 6 a" : *Altham's Case* (1610), 8 Rep. 150 b, at p. 155 a.

Father and son of same name.

"And a case between *Lewknor* and *Mountague* was cited wher the condition of a bond was, if William Mountague shall do, &c. whereas there was William Mountague the father and Willia Mountague the son, and by the averment of the meaning of th parties" (*i.e.*, by evidence of intention) "this was expounded c the son" : cited by counsel for defendant and referred to by th Court in *Buckler* v. *Millerd* (1688), 2 Vent. 107, at p. 108.

To the same effect, see (1503), Keilw. 49, pl. 6; *Davenant* v *Rafter* (1704), 6 Mod. 235. The important case of *Doe* v. *Need* (1836), 2 M. & W. 129; 6 L. J. Ex. 59; 46 R. R. 521 (dis cussed in Wigram, Extr. Ev. pl. 182 (5th ed.), p. 157), is a instance of the same principle applied to the interpretation of will. For modern cases where evidence of intention and/or c surrounding circumstances was admitted in order to determine wha person the testatrix intended to benefit, see *Re Jeffery*, *Nussey* v *Jeffery*, [1914] 1 Ch. 375; 83 L. J. Ch. 251; and *Re Ray*, *Ca* v. *Johnstone*, [1916] 1 Ch. 461; 85 L. J. Ch. 781.

Rule as stated by Wigram, V.-C.

The rule as to equivocations is stated with reference to wills i Wigram on Extrinsic Evidence (5th ed., p. 14, pl. 19, prop. vi and see pp. 110 *et seq.*), in the following terms :—

"*Proposition VII.*—Notwithstanding the rule of law, whic makes a will void for uncertainty, where the words, aided b evidence of the material facts of the case, are insufficient to dete mine the testator's meaning—Courts of law, in certain special case admit extrinsic evidence of *intention* to make certain the *perso* or *thing* intended, where the description in the will is insufficie for the purpose.

These cases may be thus defined :—Where the object of a tor's bounty, or the subject of disposition (*i.e.*, the *person* or intended), is described in terms which are applicable ferently to more than one person or thing, evidence is ssible to prove which of the persons or things so described intended by the testator."

Incorrect statement of rules as to admission of evidence to explain ambiguity.

he rule as to the admissibility of evidence to explain iguities, including equivocations, is commonly stated as ws :—"In a written instrument, if there be a *patent iguity*, it never is allowed to be explained by verbal ence, though a *latent ambiguity* is so" : Smith on Contracts ed.), p. 49. See also Smith's Law of Property (6th ed.), 1016, 1115; Chitty, Contr. (17th ed.), p. 123. Many *dicta* udges and even judicial decisions will be found to the same t.

he rule as thus stated is incorrect, for the following reasons :— n all cases of ambiguity, whether patent or latent, extrinsic ence is admissible to ascertain the literal meaning of the words, until such evidence is adduced it is impossible to say whether nstrument is ambiguous or not : see Wigr. Ex. Ev. 191 (5th ed.), 203. (2) Direct evidence of intention is admissible for the ose of explaining an equivocation, but not a patent ambiguity. to be observed also that by the phrase "latent ambiguity" e foregoing quotation is meant an equivocation; but the books use the phrase in a wider sense, including any doubt raised by application of extrinsic evidence, whether it be what is more erly called an inaccuracy, or a mere *prima facie* case of guity, which is ultimately solved by the further application of nce, other than direct evidence of intention.

National Society for the Prevention of Cruelty to Children v. *ish National Society for the Prevention of Cruelty to Children*,] A. C. 207; 84 L. J. P. C. 29, a domiciled Scotsman, by a nade in Scottish form, bequeathed a legacy to "the National ty for the Prevention of Cruelty to Children" which was the ate description of a Society having its head office in London, ot actively operating in Scotland. The legacy was claimed by Scottish National Society for the Prevention of Cruelty to ren" which had been brought to the notice of the testator e he made his will. It was held that the London Society was ed to the legacy. "Here you have an accurate description one person and a description what is admittedly not quite ate of the other. You must, I think, have positive evidence ne cogent sort to make you prefer the latter to the former. evidence unfortunately in this case I do not find," *per* Lord din. *Ibid.*, pp. 214, 215.

There is an inaccuracy of language which must be distinguishe from an ambiguity, namely, where the writer in one place makes general, and in another place a specific statement of his intentions If a man says, "I am going to France," and in another place says "I am going to Paris"; although the statement resembles a paten ambiguity in form, there is no ambiguity—all that the writer ha done is in one place to state his intention with vagueness, and i another place with accuracy. Hence the following rule—

General joined with particular statement.

> Where a deed contains both a general, vague or indefinite, and also an exact, particular, o definite statement, not inconsistent with th former, the latter must prevail.

"Et la ou fait parle p. parolx generals & puis disc̄ en pol especials si les polx especials accordent a les parols generals l fait serra entendu solongz les parolx especials": Y. B. 7 Edw. (1333), 9 b, pl. 20, at p. 10 a.

"*Quando carta continet generalem clausulam posteaqu descendit ad verba specialia quae clausulae generali sunt conser tanea interpretanda est carta secundum verba specialia*"; *Altham' Case* (1610), 8 Rep. 150 b, at s. 154 b.

Parcels.

Thus where property is conveyed both by a general and specifi description, only that specifically described will pass: *Lord Nort* v. *Bishop of Ely* (1576), cited 1 Buls. 100; *Doe* v. *Meyrick* (1832) 2 Cr. & J. 223; 1 L. J. Ex. 73; 37 R. R. 687; *Griffiths* v *Penson* (1863), 1 N. R. 330; 9 Jur. (N.S.) 385; *Re Brocket; Dawe* v. *Miller*, [1908] 1 Ch. 185; 77 L. J. Ch. 245 (a case on a will).

Policy.

A policy of life assurance was entered into, founded on a writte declaration of the assured, which was agreed to be the basis o the contract between the parties, and which contained a provis that "if any statement in the declaration (which declaration shoul be considered as much a part of that policy as if the same ha been actually set forth therein) was untrue, or if, &c., then th policy should be void." The proposal and declaration containe the usual particulars, and proceeded as follows: "I do hereb declare that the above-written particulars are correct and tru throughout, and I do hereby agree that this proposal and declara tion shall be the basis of the contract between me and" the offic "and if it shall hereafter appear that any fraudulent concealmen or designedly untrue statement be contained therein," then th policy to be void. *Held*, that the policy was not avoided by a untrue statement in the declaration unless designedly untrue *Fowkes* v. *Manchester and London Life Assurance and Loa Association* (1863), 3 B. & S. 917; 32 L. J. Q. B. 153; 129 R. R 607.

t is hardly necessary to observe that it is impossible to perceive a description is inaccurate until there has been applied nsic evidence to ascertain the literal meaning of the words, as as such intrinsic evidence, if any, as is afforded by the deed r consideration. This is why inaccuracies are sometimes rectly spoken of as "latent ambiguities," when that expression ed in a wide sense, and not as synonymous with equivocations. he discussion of the more common forms of inaccuracies in different clauses of deeds will be found in this book under the opriate headings. In this place the general rules only will be ed. Inaccuracies.

If neither the description as a whole, nor any part of it, renders it certain what object was intended, no meaning can be affixed to the words employed, and the deed or clause is void for uncertainty. Where neither whole description nor any part applies.

If a man letteth lands to A for life, the remainder to B in tail, remainter to C *in forma praedicta*, this remainder is void for incertainty": Co. Litt. 20 b.

Limitation to "*A. et B. et haeredibus*" without the word *is*"; this is only an estate for their lives, for the uncertainty se heirs are to take: Co. Litt. 8 b; Shep. Touch. 101.

Husband and wife hold an acre of land jointly of A for their : A grants the reversion of the acre which the husband alone s for his life; the grant is void, as no lands satisfy the ription: Shep. Touch. 250.

Conveyance of "all those trees which could then reasonably be ed." *Held*, void for the uncertainty: *Mervyn* v. *Lyds* (1554), 90 a.

An agreement to retire from a business so far as the law allows. *l*, void for uncertainty: *Davies* v. *Davies* (1887), 36 Ch. D. 56 L. J. Ch. 962.

If the description as a whole fits no object, but part of the description renders it certain what is intended, the rest of the description may be rejected: Shep. Touch. 247. Where part of the description renders it certain what is intended.

n *Cholmondeley* v. *Clinton* (1820), 2 Jac. & W. 1 (*arg.* at 3); 22 R. R. 84, the case is put "where, under a limitation to of a particular description, by purchase, a person apparently ıded, though not exactly answering both parts of the iption, has been allowed to take": citing *Pybus* v. *Mitford*

(1674), 1 Vent. 372; 1 Freem. 351, 369; 2 Lev. 75; *Newcomen* v. *Barkham* (1716), 2 Vern. 729; *S. C. sub nom. Brown* v. *Barkham*, Pre. Ch. 442, 461; *Wills* v. *Palmer* (1770), 5 Burr. 2615 *et seq.*; *Burtenshaw* v. *Weston* (1772), Fearne, App. 570.

In the application of this rule it must be remembered that words must be taken in their *literal* meanings, so that the same words may bear different meanings according to the circumstances of the person using them. The expression "all the lands in A purchased from S," would vary in its meaning according as lands in A had or had not been purchased from S. If some lands in A had been purchased from S, the latter words would be restrictive, but if no land in A had been purchased from S, they would have to be rejected.

Where the part of the description which gives certainty applies to more than one object.

If the part of the description which gives certainty, applies to more than one object, there is a case of equivocation, and direct evidence of intention is admissible.

Grant by deed of "all the coal mines in the lands in the occupation of K. & Son." It was shown that the grantor had not any lands at the time of making the grant "in the occupation of K. & Son." These words were rejected, and letters written by the grantor's steward to the grantees prior to the grant were permitted to be given in evidence to show what mines were intended. *Beaumont* v. *Field* (1818), 1 B. & Al. 247; 19 R. R. 308.

Part of description applying to one, part to another, but the whole applying to no object.

If one part of the description applies to one object, and another part applies to another object, but the description as a whole applies to no object, the case is similar to that of a patent ambiguity and direct evidence of intention is not admissible.

There does not appear to be any case in which this rule has been applied to a deed, but the rule is founded on the cases on wills of which *Doe* v. *Hiscocks* (1839), 5 M. & W. 363; 9 L. J. Ex. 27; 52 R. R. 748, is the leading example.

Id certum est quod certum reddi potest.

Of course the maxim *id certum est quod certum reddi potest* applies to descriptions of persons and things and classes of persons and things in deeds as in every other document.

"The certaintie of the lands or tenements to be conveyed by the feoffment either by express words or which may by reference be reduced to a certaintie for *certum est quod certum reddi potest*": Co. Litt. 6 a.

'o recapitulate : A person perusing a deed, without knowing the mstances of the parties, will detect the patent ambiguities, 'ill not detect equivocations or inaccurate descriptions, and he or may not detect those latent ambiguities which are not vocations. On the application of extrinsic evidence of the mstances to determine the literal meaning of the words, and nterpreting the words according to the context, the patent iguities may disappear, the inaccuracies and latent ambiguities, ding equivocations, will become manifest, and may subse- tly disappear. If any equivocations remain, they may be ved by direct evidence of intention. If, after this process has gone through, there remain any ambiguities of either class, ıy inaccuracies which are not made clear, no interpretation can ut on the deed.

Recapitulation.

n example may render this more clear. A grant of land to 's nephew J. living at S." has to be construed.

'irst, evidence, either extrinsic, showing that A had no nephew, a grand-nephew named J., or intrinsic, *viz.*, the context of the , may show that by "nephew" is meant "grand-nephew." ext, the extrinsic evidence adduced to show that "nephew" be read "grand-nephew" may also show that A. has two l-nephews, both named J., but that neither of them lives Thereupon, the description, "living at S.," may be rejected ing a mere inaccurate addition. There results an equivoca- and if that cannot be cleared up by applying further extrinsic nce other than evidence of intention, as, *e.g.*, that the grantor knew of one grand-nephew, or further intrinsic evidence from ontext, then in the last resort, direct evidence of intention may duced to determine which of the two grand-nephews named J. ntended by the grantor.

CHAPTER VII.

MISCELLANEOUS GENERAL RULES.

The Expression of Implied Terms has no Effect: Express Provision exclude Implication: Words to be taken Against the User Except in the case of the King.

THERE are certain miscellaneous general rules applying to th interpretation of all deeds, which are collected here.

Expression of implied terms is nugatory.

The expression of a clause that the law implie has no effect.

Expressio eorum quae tacite insunt nihil operatur: Co. Litt 191 a, 205 a; 2nd Inst. 365. *Expressio eorum quae tacite insun nihil operatur, et expressa non prosunt quae non express proderunt: Boroughe's Case* (1597), 4 Rep. 72 b, at p. 73 b.

Gift in tail.

"If a gift in tail be made to a man and to the heirs of his body and if he die without heirs of his body, that then the donor an his heirs shall re-enter, this is a voyd condition; for when th issues fail, the estate determineth by the expresse limitation, an consequently the adding of the condition to defeat that which i determined by the limitation of the estate is void, and in that cas the wife of the donee shall be endowed": Co. Litt. 224 b.

Reservation of rent in a lease for years to the lessor during hi life and his assigns. *Held*, that the reservation to the assigns ha no effect, because the addition of assigns is implied by law: *Sury v Cole* (1627), Latch, 44 and 25; Pal. 481; *S. C. sub nom. Sury v Brown*, Latch, 99; *Wotton and Edwins' Case* (1607), cite 1 Vent. 162.

Joint tenancy.

"If lands be letten to two for terme of their lives, *et eorum alterius diutiùs viventi*, and one of them granteth his part to stranger, whereby the joynture is severed, and dyeth, here shall b no survivour, but the lessor shall enter into the moity, and th survivour shall have no advantage of these words *et eorum alterii diutiùs viventi*, for two causes. First, for that the joynture severed. Secondly, for that those words are no more than th Common Law would have implied without them": Co. Litt. 191

Feoffment reserving rent to the feoffor, "and if it happens th aforesaid rent to be behind in part or in all, that then it shall b

l for the feoffor and his heirs to enter." It is not necessary to the power of re-entry because the feoffor and his heirs can by force of the reservation. "*Quae dubitationis causa dae inseruntur, communem legem non laedunt. Et expressio,* : Litt. ss. 330, 331 : Co. Litt. 205 a.

Leases.

The clause of distress (in a lease) is no otherwise to be extended as the grantor gives it; and therefore if the clause were, 'if ent be behind, being demanded at another place besides the or of his person, then he may distrain,' clearly then he could istrain without such a demand made first, for there the demand ner than the law requires. But where the clause is no more if the rent be behind being lawfully demanded, then he may ain,' it is no more than the law speaks; and therefore the ss implying a demand and distress, one before another, peration of law satisfies it": *Browne* v. *Dunnery* (1617), 208.

jectment on a proviso for re-entry contained in a lease on the being in arrear for twenty-one days, *being lawfully demanded.* Act of Geo. 2 (1730), c. 28, provides that when half a year's s in arrear, and the lessor has a right by law to enter for non-ent, he may without a formal demand or entry sue in eject- *Held,* there being five quarters in arrear, that it was not sary to make a demand of the rent on the premises before ing the ejectment. Dampier, J., said: "The right to re-enter out of the stipulation of the parties. A demand is necessary consequence of law, and there was the same necessity for a nd before the statute whether the lease contained the words ully demanded' or not. Therefore the maxim applies; ssio, &c.": *Doe* v. *Alexander* (1814), 2 M. & S. 525, at 2; 15 R. R. 338.

wers of distress for rent are not obnoxious to section 6 of the of Sale Act, 1878: *Re Roundwood Colliery Co.*; *Lee* v. dwood *Colliery Co.*, [1897] 1 Ch. 373, at p. 391; 66 Ch. 186.

Mortgages.

here a mortgage deed expressly secured the mortgagees' ses and interest: *Doe* v. *Snaith* (1832), 8 Bing. 146; ore & Scott, 230; the payment by the mortgagor of all on the mortgaged property: *Doe* v. *Bragg* (1838), 8 Ad. & El. Nev. & P. 644; fines for renewals if paid by the mortgagee: ghton v. *Turtle* (1843), 11 M. & W. 561; 13 L. J. Ex. 57; R. 678; the expenses incurred by the mortgagee in keeping olicy of life insurance comprised in the security: *Lawrance* v. n (1851), 7 Ex. 28; it was held, that as in each of these the moneys expended by the mortgagee for these purposes have been charged by the law without any express words,

the rule applied, and that consequently the deed did not requi any *ad valorem* stamp in respect of the moneys so expended.

Unnecessary words apparently restrictive.

The rule is applied where the words state onl part of that which the law implies, so that the appear at first sight to be restrictive.

"Mountague asked this question: A man makes a lease for term of years by indenture, and the lessor covenants and grant to the lessee, 'that he shall have thorns for hedges growing upo the land, *by the assignment of the bailiff* of the lessor, *and necessar fuel* to burn in his house.' First, whether the lessee can tak thorns *without the assignment* of the bailiff, or not? Secondly, by the copulative (*and necessary fuel*) that shall refer to th *assignment of the bailiff*, or not? For the first, it seemed t Baldwin and Fitzherbert, that the lessee, by virtue of his lease may well cut thorns without assignment by the order of the law for by our books the law is, that a termor shall have loppings an shrowdings of trees for necessary fuel; and then to insert thes words, 'that he shall have fuel *by the assignment of his bailiff*' i void, for what the law gives him by implication in the lease, that h may take without assignment. For, if I lease to one, two acres o meadow, and that it shall be lawful for the lessee to cut the gras *at the assignment of the lessor*, notwithstanding these words, th lessee may cut the grass. But if the other covenant on his par in a negative, 'that he will not take thorns without the assignmen of the lessor,' now that is a good covenant, and if he do contrar to that, action of covenant well lies. Or if it were a conditio which is a negative in law, as, 'proviso that he shall not tak thorns without, &c.,' now if he do that, clearly the lessor ma enter, &c. But in the other case, it is a grant on the part of th lessor in the affirmative. Wherefore, &c.: Shelley *è contrà*; fo when a man takes a lease out of the order of the law, *viz.*, b special words and terms, he shall have it as if the lessor spoke th words, and no otherwise. Wherefore here he hath accepted th lease by such words, 'that he shall have thorns by the assignmen of the bailiff'; that is as much as to say, he shall not have ther without the assignment. Wherefore, &c. And as to the othe point, it seemed to him that this copulative (*and*) should make th fuel pass by assignment, &c.": *Anon.* (1536), Dyer, 19 b, pl. 115

Grants.

S. bargains and sells to G. all the trees growing in and on manor, and covenants that G. might within five years fell an carry away the trees, etc. *Held*, that G. might cut and carry awa the trees after the five years, as the power to fell them implied b the grant could not be restrained by expressly giving the grante

ame power : *Stukeley* v. *Butler* (1614), Hob. 168, see p. 173; e, 880.

. granted to B. liberty to carry a sough or drain through A.'s d and liberty to make two little sough pits in A.'s ground for nore easy and safe carrying up the tail of the sough. *Held*, with the liberty of making a sough in A.'s land, there passed cident thereto the liberty of making sough pits at any time wards while the object of the grant remained, such sough pits necessary for the purpose of repairing the sough. And that pecial liberty of making two sough pits did not control the y of making new sough pits for necessary repairs of the : *Hodgson* v. *Field* (1806), 7 East, 613; 8 R. R. 701.

eoffment by D. of certain closes reserving unto D. and his heirs e coals, with liberty for D., his heirs and assigns at all times after, "during the time that D. and his heirs should continue rs of F.," to sink pits, etc. *Held*, that D. could get coals r the reservation in fee, and that the express liberty to get coals was not restrictive of that which would be implied : *gan* v. *Armitage* (1823), 2 B. & C. 197; 26 R. R. 313.

here a partition deed excepted and reserved to tenants in non the mines and minerals with power to enter and work the for the joint benefit of the tenants in common "in as full and e a manner to all intents and purposes as if these presents and artition and division" of the said lands had not been done and , it was held that the common law right of the successors in to the surface to support was by necessary implication ced and that the successors in title to the mines could work so as to cause the surface and holdings thereon to subside : *l* v. *Moira Colliery Co.*, [1915] 1 Ch. 257; 84 L. J. Ch. 155, red; *Davies* v. *Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 86 L. J. Ch. 298.

the House of Lords the orders in the Courts below relative is case were discharged by consent, [1918] A. C. 555; 87 Ch. 629.

Unnecessary words may alter construction of subsequent clause.

t the expression of unnecessary words may alter the construc- of a subsequent clause.

Though the law say, that when a man grants lands, he grants nderwoods inclusively, and so when he grants his house, he all the several rooms in the house, yet 33 & 34 Eliz. (1591), King's Bench, between *Kenisham* and *Redding*, the case that the Queen leased the Parsonage of Greenwich, with all nds and underwoods expressly thereunto belonging, *exceptis us grossis arboribus boscis*" (*i.e.*, timber and underwood) *naeremiis*" (*i.e.*, timber fit for building). The opinion of the was that the exception as to underwoods was void. But they

held that the exception was only to be extended to great woods So is the case 9 Eliz. (1567) 265, of a lease of a house and shops excepting the shops, which proves that the rule '*expressio eorum*, etc., is to be understood having reference to itself only, and no having relation to other clauses": *per* Hobart, C.J., *Stukeley* v *Butler* (1614), Hob. 168, at p. 170; *S. C. sub nom. Stewkly* v *Butler*, Moore, 880.

An express provision excludes implication.

An express provision excludes the implicatio of any provision to the same effect.

Semper expressum facit cessare tacitum: Co. Litt. 183 b; *in hoc casu designatio unius personae est exclusio alterius, e expressum facit cessare tacitum*: Co. Litt. 210 a.

"Where parties have entered into written engagements wit expressed stipulations, it is manifestly not desirable to extend ther by any implications: the presumption is that, having expresse some, they have expressed all the conditions by which they inten to be bound under that instrument": *per* Lord Denman, C.J. *Aspdin* v. *Austin* (1844), 5 Q. B. 671, at p. 684; 13 L. J. Q. B 155.

"If authority is given expressly, though by affirmative words upon a defined condition, the expression of that condition exclude the doing of the act authorised under other circumstances tha those so defined; *expressio unius est exclusio alterius*": *pe* Willes, J., *North Stafford Steel, etc. Co.* v. *Ward* (1868), L. R. Ex. 172, at p. 177; 37 L. J. Ex. 83.

Conveyance.

Conveyance of an iron foundry and two dwelling-houses and th appurtenances, together with the fixtures in the dwelling-houses *Held*, that the fixtures in the foundry did not pass: *Hare* v. *Horto* (1833), 5 B. & Ad. 715; 3 L. J. K. B. 41; 39 R. R. 633 cited in *Mather* v. *Fraser* (1856), 2 K. & J. 536, at p. 553; 2 L. J. Ch. 361; 110 R. R. 350.

Habendum.

"If a lease be made to two, habendum the one moity to th one, and the other moitie to the other, the habendum doth mak them tenants in common; and so one part of the deed doth explain the other, and no repugnancy between them, *et semper expressu facit cessare tacitum*": Co. Litt. 183 b.

Covenant.

In an assignment of the equity of redemption the provision of the deed were held sufficient to negative the obligation t indemnify the vendor against the mortgage debt, and on the tru construction of the deed there was no covenant to indemnify: *Mill* v. *United Counties Bank, Ltd.*, [1911] 1 Ch. 669; 80 L. J. Ch. 334 affirmed as to the effect of the deed, [1912] 1 Ch. 231; 81 L. J Ch. 210.

trustee mortgaged lands and covenanted for payment out of moneys which should come to his hands as trustee. *Held*, he was not personally liable: *Mathew* v. *Blackmore* (1857), J. Ex. 150; 108 R. R. 810; 1 H. & N. 762. The Court said 771—772): "The question is, whether a contract by parol be implied for the repayment where there is an express nant under seal relative to it. The rule of law, as well as of n and good sense, is '*expressum facit cessare tacitum*,' and e there is an express covenant that the defendant shall, out e trust funds which shall come to his hands and the personal e of his testator (which was not included in the mortgage ity) pay the sum advanced, we think it impossible to conclude at the same time he made himself absolutely liable for the ient of it *simpliciter*; and at all events to do so would be to e a contract by implication different from, and much more ous than, that entered into by the express words used, and against a trustee having no personal interest whatever in the action."

"Demise."

he covenants implied by the word "demise" are restricted by xpress qualified covenant for quiet enjoyment: *Noke's Case*), 4 Rep. 80 b; *Merrill* v. *Frame* (1812), 4 Taunt. 329; 13 . 612; *Line* v. *Stephenson* (1838), 5 Bing. N. C. 183. The are further discussed *infra*, Chapter on Qualified Covenants Covenants for Title.

ith regard to the maxim "*Expressio unius exclusio alterius*" the necessity for caution in its application, see *Gregg* v. *rds*, [1926] Ch. 521, at pp. 527, 528; 95 L. J. Ch. 209, and cited. The same caution appears necessary in regard to the maxim: *Expressum facit cessare tacitum.*

Words to be taken against the person using them.

The words in a deed are to be construed most strongly against him who uses them, if so doing works no wrong.

is rule is often misunderstood: it does not mean that the are to be twisted out of their proper meaning, but only that the words may properly bear two meanings, and where, after missible evidence, whether extrinsic or intrinsic, has been d, it still remains uncertain in which of those meanings the were used, the meaning most disadvantageous to the person ses them is to be taken, unless so doing would work a wrong the meaning of which see the quotation from Coke, *infra*).

Reason for rule.

e reason for the rule is that "the principle of self-interest ake men sufficiently careful not to prejudice themselves by words of too extensive a meaning, and all manner of deceit is

hereby avoided in deeds : for people would always affect ambiguo expressions, if they were afterwards at liberty to put their ow construction on them" : Cruise Dig. tit. 32, c. 19, s. 13; and t the same effect is Shep. Touch. 87.

Lease for life.

"A., tenant in fee simple, makes a lease of land to B. to hav and to hold to B. for terme of life, without mentioning for whos life it shall be, it shall be deemed for terme of the life of th lessee, for it shall be taken most strongly against the lessor, an as hath beene said, an estate for a man's own life is higher tha for the life of another. But if tenant in taile make such a leas without expressing for whose life, this shall be taken but for th life of the lessor, for two reasons.

Working a wrong.

"First, when the construction of any act is left to the law the law, which abhorreth injury and wrong, will never so constru it as it shall work a wrong : and in this case, if by constructio it should be for the life of the lessee, then should the estate tail be discontinued, and a new reversion gained by wrong : but i it be construed for the life of the tenant in taile, then no wron is wrought. And it is a generall rule, that whensoever the word of a deed, or of the parties without deed, may have a doubl intendment, and the one standeth with law and right, and th other is wrongfull and against law, the intendment that standet with law shall be taken.

"Secondly, the law more respecteth a lesser estate by right than a larger estate by wrong; as if tenant for life in remainde disseise tenant for life, now he hath a fee simple, but if tenant fo life die, now is his wrongful estate in fee by judgment in law changed to a rightful estate for life" : Co. Litt. 42 a and 42 b.

"If a man make a charter in fee and deliver seisin for life *secundum formam cartae*, the whole fee simple shall passe for it shall be taken most strongly against the feoffor" : Co. Litt 48 a.

"It is a maxime in law, that every man's grant shall be take by construction of law most forcible against himself. *Quaelibe concessio fortissimè contra donatorem interpretanda est*, which is s to be understood, that no wrong be thereby done; for it is anothe maxime in law, *Quod legis constructio non facit injuriam.* An therefore if tenant for life maketh a lease generally, this shall b taken by construction of law an estate for his own life that mad the lease; for if it should be a lease for the life of the lessee it should be a wrong to him in the reversion. And so it is if tenan in taile make a lease generally, the law shall contrive this t be such a lease as he may lawfully make, and that is for term of his owne life; for if it should be for the life of the lessee, it shoul be a discontinuance, and consequently the state which should pass

nstruction of law should worke a wrong" : Co. Litt. 183 a, Working a wrong.

A release in deed, which is the act of the partie, and shall be most strongly against himselfe" : Co. Litt. 264 b.

For in the Common Law the grant of every common person is most strongly against himself and most favourably towards rantee" : *per* Weston, J., *Willion* v. *Berkley* (1562), 223, at p. 243.

This being the grant of Thomas Fonnereau, it is truly argued, he grant is to be taken as extensively in favour of the objects settlement, the wife and her children, and as strongly against rantor, as fair inference can allow" : *per* Sir Richard , M.R., in *Swann* v. *Fonnereau* (1796), 3 Ves. Jun. 41, 48.

f there is any difference between a deed and a will where the ment admits of two constructions, the deed is to be taken ore strongly against the grantor" : *per* the Lord Chief Baron *phens* v. *Frost* (1837), 2 Y. & C. Ex. 297, at p. 309; 6 L. J. Eq. 41.

The principle of construction which has been so strenuously ıded for, viz., that the terms of a grant are to be construed as ably as possible for the grantee, the Court is not disposed to vert" : *per* Wilde, C.J., *Re Stroud* (1849), 8 C. B. 502, at); 19 L. J. C. P. 117; 79 R. R. 608.

n the first place it is to be observed that all deeds are to nstrued most strongly against the grantor" : *per* Lord y, M.R., *Johnson* v. *Edgware, etc. Ry. Co.* (1866), 35 B. t p. 484; 35 L. J. Ch. 322.

t is well settled that the words of a deed, executed for le consideration, ought to be construed as far as they ly may in favour of the grantee" : *per* Selborne, L.C., . *Devonshire* (1882), 8 App. Cas. 135, at p. 149.

is a rule of construction, that where there is a grant and an on out of it, the words of the exception are to be considered words of the grantor, and are to be construed in favour of ntee" : *per* Holroyd, J., *Bullen* v. *Denning* (1826), 5 B. & C. p. 850; 4 L. J. (o.s.) K. B. 314; 29 R. R. 431. Construction of exception.

is a settled rule of construction that where there is a grant exception out of it, the exception is to be taken as inserted benefit of the grantor and to be construed in favour of the . If then the grant be clear but the exception be so framed e bad for uncertainty, it appears to us that on this principle nt is operative and the exception fails" : *per* Stirling, L.J., *Bros., Ltd.* v. *Bethell*, [1902] 2 Ch. 523, at p. 537; 71 h. 652, in which case an exception of "a piece of land not

less than forty feet in width commencing at a point A ar terminating at the nearest road *to be made*" by the grantee, w held void for, amongst other grounds, uncertainty.

Warranty. Thus a warranty of land generally, without saying against ever body, is a warranty against everybody, for it is either again everybody or nobody, and the words must be read against th warrantor: *Buckhurst* v. *Dacres* (1598), 2 And. 118.

Leases. Land being leased for thirty-one years, four years after th beginning of the term the lessor granted a new lease to anoth person as follows: "Know that I, the aforesaid thirty-one yea being completed, have demised and granted all the premises, &c habendum from the day of the making of these presents, the ter aforesaid being first finished until the end of the term of thirty-on years then next ensuing." *Held*, that the term should begin aft the termination of the term of thirty-one years, as otherwise th lessee would only have a lease for four, not thirty-one, years, an every grant shall be expounded most strongly for the grantee *Anon.* (1566), Dy. 261 b, pl. 28.

A man makes a lease of Blackacre to A for ten years, and Whiteacre to B for twenty years; and afterwards by indentur reciting the former leases, demises both Blackacre and Whiteac to another for forty years, to begin after the end and determinatio of the said several leases made to A and B. Afterwards the form lease of Blackacre ends during the currency of the lease of Whit acre; it was held, that the habendum in the latter lease was to b taken *respective* and that the new term for forty years in Blackac began immediately on the determination of the term of ten years it granted by the former lease, on the ground that "every deed sha be taken more strongly against the grantor, and more beneficiall for the grantee, and it is more strong against the lessor and mo beneficial for the lessee to have the lease in Blackacre to beg presently after the expiration of the first lease made thereof, tha to tarry till the lease of Whiteacre be ended. If I release unto yo all actions which I have against you and another, in this cas notwithstanding the joint words, all actions which I have again you alone are released, for it shall be most beneficially f him to whom the release is made, and most strongly again him who makes it": *Justice Windham's Case* (1589), 5 Re 7, at p. 7 b.

Lessee for 100 years made a lease for forty years to T. S., he should so long live: and afterwards he demised it to Joh "habendum after the term of forty years, for the term of twent three years to be computed from the date of these presents." *Hel* that the lease to John should commence from the expiration of th lease to T. S., on the ground that, if the limitation be not certa

the term shall begin, it shall be taken most beneficially for essee : *Seaman's Case* (1610), Godb. 166.

a lease for twenty-one years, there was a covenant that the should have the land for twenty-one years more after the ation of the said term, and "so from twenty-one years to y-one years, until ninety-nine years past thence next ensuing be complete and ended." The question arose whether the twenty-one years were included in the ninety-nine; and en, J., said : "The words, 'from thence next ensuing,' may be ed to the beginning of the first term, or to the end of it"; upon Scroggs, C.J., said : "Therefore it standing so erent, we ought to construe it most strongly against the or," and the Court decided that the first twenty-one years not to be computed in the ninety-nine : *Manchester College* v. *ord* (1679), 2 Show. 31; 2 Lev. 241. Lease for two years in and thereafter from year to year : *Re Searle*; *Brooke* v. *e*, [1912] 1 Ch. 610; 81 L. J. Ch. 375; and see p. 113 (*supra*).

Lease and release.

Doe and Williams v. *Williams* (1788), 1 H. Bl. 25; 2 R. R. where a conveyance was made by lease and release of the Clock "and all lands and meadows to the said messuage or mill ging, or used, occupied, and enjoyed, or deemed, taken or ted as part thereof," the rule was applied in order that three of leasehold land, which had for thirty-seven years been held the Clock Mills, should pass.

Covenants.

e rule has been applied to the construction of covenants for enjoyment and title : *Broughton* v. *Conway* (1564), Dyer, *Gainsford* v. *Griffith* (1667), 1 Saund. 60; *Howell* v. *Richards*), 11 East, 633; 11 R. R. 287; *Barton* v. *Fitzgerald* (1812), ast, 530; 13 R. R. 519; but see *Nind* v. *Marshall* (1819), d. & Bing. 319; 21 R. R. 610; of covenants by a lessee : *tt* v. *Bedford* (1800), 8 T. R. 602; *Webb* v. *Plummer* (1819), & Ald. 746, *per* Holroyd, J., at p. 751; 21 R. R. 479; of a o in a lease : *Doe* v. *Stevens* (1832), 3 B. & Ad. 299; 1 L. J. 101; 37 R. R. 429; of the words "for seven, fourteen, enty-one years," in an agreement for a lease : *Dann* v. *er* (1803), 3 Bos. & Pul. 399; 7 R. R. 797; and of similar in a lease : *Doe* v. *Dixon* (1807), 9 East, 15; 9 R. R. 501. here the grantor takes an interest under his own grant, the vill be construed as if a stranger were the grantor : *Vincent* v. (1856), 22 Beav. 380; 25 L. J. Ch. 589; 111 R. R. 402.

Objections to rule.

e rule was objected to by Jessel, M.R., who said (*Taylor* v. *ation of St. Helens* (1877), 6 Ch. D. 264, at p. 270) : "I do e how, according to the now established rules of construction, led by the House of Lords, in the well-known case of *Grey* v. *n* (1857), 6 H. L. C. 61; 26 L. J. Ch. 473, 108 R. R. 19;

followed by *Roddy* v. *Fitzgerald* (1858), 6 H. L. C. 823; R. R. 327, and *Abbott* v. *Middleton* (1858), 7 H. L. C. 68; L. J. Ch. 110; 115 R. R. 38, that maxim can be considered having any force at the present day. The rule is to find out meaning of the instrument according to the ordinary and pro rules of construction. If we can thus find out its meaning, we not want the maxim. If, on the other hand, we cannot find its meaning, then the instrument is void for uncertainty, and that case it may be said that the instrument is construed in fav of the grantor, for the grant is annulled." See 46 L. J. Ch. for same case.

Who is the person using the words?

In Shep. Touch. p. 87, note (81), and 2 Bl. Com. Bk. II. c. (8th ed. p. 380), citing Plowd. 134, a distinction is drawn betw an indenture and a deed-poll to the effect, that as the latter executed by the grantor alone, and the words are his only, should therefore be taken most strongly against him; but that an indenture is executed by both parties, the words are to considered those of them both : see *Scovell and Cavel's Case* (158 1 Leon. 317, at p. 318. It seems, however, that these rema require to be supplemented by the explanation that, as rega indentures, the law will consider the words to be spoken by him w can properly speak them.

"First, it is to be considered that the lease and also the coven and grant to pay the sum, is made by indenture, and the words an indenture are the words of both parties; and although they spoken as the words of one party only, yet they are not his wo alone, for there is the assent of the other party to each othe words; and therefore, when they are written, they shall be tak in such manner as the intent of the parties may be supposed to And they shall not be taken most strongly against one and be ficially for another, as the words of a deed-poll shall, for there words shall be taken most strongly against the grantor, and m available to the grantee. But it is not so in a deed indent because the law makes each party privy to the speech of the oth and therefore we ought not to make such construction of words an indenture as in a deed-poll. But if an indenture conta matter of substance, the law will make such reference thereof a most fit and reasonable, and will say that the words are spoken him who could most properly speak them; and therefore, wh the plaintiff here has covenanted and granted to render and the said sum for the lands, the words are in fact the words of lessee, but in construction of law they shall be taken as the wo of reservation of the lessors, inasmuch as they have the sense a effect of a reservation. For words of covenant and grant to ren and pay such a sum for the land have the effect of reserving

aying rent for the land, and so the law will take them to be ɔoken by the lessors. As if a man make a feoffment in fee by eed indented rendering such rent, there it ought to be considered ıat it cannot be reserved as a rent may upon an estate for years, ɔr life, or in tail, because the reversion is not in the feoffor, and et the feoffor shall have it as a rent granted by the feoffee. And y the same reason that the law there takes the words of the feoffor s the words of the feoffee, by the like reason in our case it will ıke the words of the lessee as the words of the lessor, for they ɜrve most properly that way. And if the deed indented had ɔecified that the plaintiff should have the land, and should pay 0s. yearly, that would be a rent, for the law refers the words in ıy writing indented to be spoken by him that can best speak ıem" : *per* Staunford and Walsh, *arguendo*, *Browning* v. *Beston* 1552), Plowd. 131, at p. 134.

There is, however, an exception to the rule, for—

The King's grant.

> "The King's grant is taken most strongly against the grantee, and most favourably for the King, although the thing which he grants came to the King by purchase or descent" : *per* Weston, J., *Willion* v. *Berkley* (1562), Plowd. 223 at p. 243.

The reason for mentioning the case where the King takes by ırchase or descent is to show that the rule applies not only to rown lands.

A grant by the Crown of "lands" and "mines" does not pass es royal or mines royal; *contra*, if the King grant all mines which has in the lands of A, and has a royal mine there, for the King ınnot be deceived in his grant : *R.* v. *Northumberland, the Case Mines* (1568), Plowd. 310.

Where the King, being seised of two manors, A and B, granted *totum illud maner' de A. & B.*," or "*totum illud maner' de A. m B.*," it was held that neither manor passed; and where the ing granted all the demesne lands of a manor, it was held that pyholds parcel of the manor, did not pass : *Case del Alton Woods* 600), 1 Rep. 26, at pp. 46 a, 46 b.

If the King grants "*the manor of D., which he hath by the tainder of A.*," and in truth he hath it not by his attainder, the ant is void : *Case del Alton Woods, ubi sup.* at p. 52 a.

No election against King.

If the King grants 120 acres of his waste in D, and the waste ntains 300 acres, the grant is void, for there is no election against King : *Brand* v. *Todd* (1618), Noy, 29.

This exception is further discussed in *R.* v. *Imber* (1579), 2 ll. Abr. 186; *Bozoun's Case* (1584), 4 Rep. 34; *Green's Case*

(1602), 6 Rep. 29 a; *Mason* v. *Chambers* (1604), Cro. Jac. 3
Yelv. 42; *Chandos' Case* (1606), 6 Rep. 55; *Auditor Curle's Ca*
(1609), 11 Rep. 2 b; *Whistler's Case* (1612), 10 Rep. 63; *Mead*
Lenthal (1637), 2 Roll. Abr. 189; *Att.-Gen.* v. *Hungate* (166
Hard. 231; *Holland* v. *Fisher* (1662), O. Bridg. 181; *The King*
The Bishop of Rochester and Sir F. Clerke (1675), 1 Mod. 19
2 Mod. 1; Freeman, K. B. 172, 178; 3 Keble, 412; *Lee* v. *Brow*
(1676), Freeman, K. B. 207; *Att.-Gen.* v. *Farmer* (1676), S
T. Raym. 241; 2 Lev. 171; *S. C. sub nom. Att.-Gen.* v. *Turne*
2 Mod. 106; *R.* v. *Bishop of Chester* (1697), Ld. Raym. 292; Sho
P. C. 212; *The King* v. *Capper* (1817), 5 Pri. 217; 19 R. R. 56
Att.-Gen. v. *Marquis of Downshire* (1818), 5 Pri. 269; 19 R. R
603; *Att.-Gen.* v. *Ewelme Hospital* (1853), 17 B. 366, at p. 38
22 L. J. Ch. 846; 99 R. R. 185; and other cases cited in Crus
Dig., vol. 5, tit. xxxiv; and also in Chitty on Prerogatives of t
Crown, p. 391.

Grantee must be alive.

The grantee must be "in being at the time of the grant ma
[if he be to take immediately]": Prest. Shep. Touch. 235.

CHAPTER VIII.

EXTRINSIC EVIDENCE INADMISSIBLE TO ADD TO DEEDS.

Extrinsic Evidence inadmissible to add to Deeds: but admissible to show Date, Consideration, or that Deed is one of a series: or to prove Collateral Agreement, or Terms implied by Custom or Usage: or to show that Deed is not binding: Admissibility of subsequent Admissions or Conduct.

A FURTHER rule relating to the interpretation of deeds is that the eed only is to be construed, and that—

> No evidence of extrinsic circumstances is admissible to add to, contradict, vary, or alter the terms of a deed.

Extrinsic evidence inadmissible to add to or alter deed.

This rule is not, properly speaking, a rule of interpretation; it s a rule of law limiting the subject-matter to be interpreted to that ontained in the deed itself.

"It would be inconvenient that matters in writing made by dvice and on consideration, and which finally import the certain ruth of the agreement of the parties, should be controlled by the verment of the parties to be proved by the uncertain testimony of ippery memory. And it would be dangerous to purchasers and armers, and all others in such cases, if such nude averments gainst matter in writing should be admitted": *The Countess of utland's Case* (1604), 5 Rep. 25 b, at p. 26 a.

"To add anything to an agreement in writing by admitting arol evidence, which would affect land, is not only contrary to the tatute of Frauds and Perjuries, but to the rule of Common Law, efore that statute was in being": *per* Lord Hardwicke, C., *arteriche* v. *Powlet* (1742), 2 Atk. 383, at p. 384.

"The rule is perfectly clear, that where a deed is in writing, it ill admit of no contract that is not part of the deed. Whether it dds to, or deducts from, the contract, it is impossible to introduce on parol evidence": *per* Lord Thurlow, C., *Lord Irnham* v. *hild* (1781), 1 Br. C. C. 92, at p. 93; 2 Dick. 554.

"It is not necessary to cite any case to prove the proposition at parol evidence of a parol communication between the parties

ought not to be received to add a term not inserted in the specifi agreement which they have executed; and for this reason, th what passed between them in that communication may have bee altered and shifted in a variety of ways, but what they have signe and sealed was finally settled. It would destroy all trust, it woul destroy all security and lay it open, unless the parties are com pletely bound by what they have signed and sealed": *per* Lor Loughborough, C.J., *Haynes* v. *Hare* (1791), 1 H. Bl. 659, p. 664; 2 R. R. 810.

"I have never heard the general rule contradicted, that parol extrinsic evidence cannot be admitted to contradict, vary, or add t the terms of a deed": *per* Park, J., *Smith* v. *Doe* (1821 2 Brod. & Bing. 473, at p. 541; 22 R. R. 19.

No evidence of negotiations.

"By the general rules of the Common Law, if there be contract which has been reduced into writing, verbal evidence not allowed to be given of what passed between the parties eith before the written instrument was made, or during the time that was in a state of preparation, so as to add to or subtract from, in any manner to vary or qualify the written contract; but after th agreement has been reduced into writing, it is competent to th parties, at any time before breach of it, by a new contract not writing, either altogether to waive, dissolve, or annul the form agreements, or in any manner to add to, or subtract from, or va or qualify the terms of it, and thus to make a new contract which to be proved, partly by the written agreement, and partly by th subsequent verbal terms engrafted on what will be thus left of th written agreement": *per* Lord Denman, C.J., *Goss* v. *Lo Nugent* (1833), 5 B. & Ad. 58, at p. 64; 2 L. J. K. B. 12 39 R. R. 392; and Stephen, Dig. Ev. Art. 90. See *Williams* *Moss Empires, Ltd.*, [1915] 3 K. B. 242; 84 L. J. K. B. 176 and *Morrell* v. *Studd and Millington*, [1913] 2 Ch. 648, whe Astbury, J., on p. 659 says, in regard to *Goss* v. *Lord Nuge* (*supra*), and other similar cases: "They merely decide that wh a contract falling within the Statute of Frauds is once made, conduct or verbal waiver can be relied upon to substitute a differe term from one appearing in the contract itself."

New contract may be made.

In *Morris* v. *Baron*, [1918] A. C. 1; 87 L. J. K. B. 145, it w held that a parol contract for sale of goods, though unenforceab by reason of non-compliance with the Sale of Goods Act, 189 may impliedly rescind a contract for the sale of goods required be in writing by section 4 of the said Act, where there is a cle intention on the part of the parties to rescind as distinguished fro an intention to vary. As to an implied agreement to extend ti after the period for completion of the contract had expired, and t sense of the agreement was collected from written evidence,

'artley v. *Hymans*, [1920] 3 K. B. 475; 90 L. J. K. B. 14. ee also *Bruner* v. *Moore*, [1904] 1 Ch. 305; 73 L. J. Ch. 377.

"If parties have made an executory contract which is to be arried out by a deed afterwards executed, the real completed ontract between the parties is to be found in the deed, and you ave no right whatever to look at the contract, although it is ecited in the deed, except for the purpose of construing the deed self. You have no right to look at the contract either for the urpose of enlarging or diminishing, or modifying the contract hich is to be found in the deed itself": *per* James, L.J., *Leggott* . *Barrett* (1880), 15 Ch. D. 306, at p. 309; 51 L. J. Ch. 90. Contract followed by deed.

"It is not only the law of Scotland but of the United Kingdom, at if a previous treaty or correspondence results in a final and istinct written agreement, the prior correspondence cannot, as a eneral rule, be resorted to in order to construe the agreement, by hich it has been superseded and discharged" *per* Lord Fitzgerald, *Lee* v. *Alexander* (1883), 8 A. C. 853, at p. 872. "Speaking enerally, it is perfectly clear that when you have a conveyance hich expresses the final concluded deliberate terms of the contract etween the parties, you cannot affect or alter that by reference the antecedent contract": *per* Cozens-Hardy, M.R., in illbourn v. *Lyons*, [1914] 2 Ch. 231, at p. 240; 83 L. J. Ch. 737.

"No claim is made to rectify this deed. The drafts cannot, erefore, properly be received in evidence to alter its language; ill less to explain or assist in the interpretation of the deed as ally executed": *per* Lord Lindley, *National Bank of Australasia* . *Falkingham & Sons*, [1902] A. C. 585, at p. 591; 71 L. J. . C. 105. Draft cannot be read.

Thus evidence was not admitted to show that the condition of bond did not express the agreement between the parties: *Buckler* *Millerd* (1688), 2 Vent. 107; *Mease* v. *Mease* (1774), 1 Cowp. 47; inson v. *Tremere* (1834), 1 Ad. & El. 792; 3 L. J. K. B. 218; R. R. 426; 3 N. & M. 603. Bond.

Where a conveyance was made to A upon trust to convey to B, idence that B was not to be able to alienate was rejected: *Lake* *Phillips* (1637), 1 Rep. in Ch. 110. Settlement.

Where marriage articles provided that within six months after e marriage the husband should cause certain lands to be conveyed him in fee so that the wife should become entitled to dower, and, the settlement executed pursuant to the articles, a jointure was ven to the wife in lieu of dower, evidence was not admitted to ow the reason of the change: *Brydges* v. *Duchess of Chandos* 794), 2 Ves. Jr. 417, at p. 422.

Where a son conveyed to his father nominally as purchaser, but lly as a trustee, and afterwards the father made a will containing Conveyance to trustee.

a general devise, the son was not permitted after his father's deat to adduce parol evidence to prove the trust: *Leman* v. *Whitle* (1828), 4 Russ. 423; but it may be doubted whether this case good law. See Sugden on Vendors and Purchasers (14th ed. p. 702; and see *per* Stirling, J., *Re Duke of Marlborough*, [1894 2 Ch. 133, at pp. 142, 145; 63 L. J. Ch. 471. The evidence wa of a fact consistent with the deed.

Where land in lease was conveyed by deed, evidence of a co temporaneous parol agreement between the parties to apportion th rents up to the time of purchase was not admitted: *Flinn* v. *Calo* (1840), 1 Man. & Gr. 589.

Conditions of sale.

Conditions of sale not admitted to restrict the parcels in th purchase deed: *Doe* v. *Webster* (1840), 12 Ad. & El. 442; 4 P. & I 270; 54 R. R. 597.

Contract for sale.

A preliminary agreement not admitted to enlarge the parcels i a purchase deed: *Williams* v. *Morgan* (1850), 15 Q. B. 782 81 R. R. 803.

Agency.

Where a contract is made by a person described as "owner or "proprietor" it cannot be shown that he was only agent *Humble* v. *Hunter* (1848), 12 Q. B. 310; 17 L. J. Q. B. 350 *Formby* v. *Formby*, [1910] W. N. 48; but cf. "charterer, *Drughorn, Ltd.* v. *Rederiaktiebolaget Transatlantic*, [1919] A. C 203, at pp. 206, 207; 88 L. J. K. B. 233. "A person who sign seals, and delivers a deed of covenant cannot avoid liability und the deed by signing a name which he represents as, but which not in fact, his own, nor can he saddle such liability on the perso whose name he uses, unless he is the duly constituted attorney such person": *Fung Ping Shan* v. *Tong Shun*, [1918] A. C. 40 at p. 407; 87 L. J. P. C. 22.

Occupation.

Conveyance of "all that messuage, &c., called G. Farm, in th occupation of, &c., and containing, &c., and consisting of th several particulars specified in the schedule, and delineated on th map in the margin." Evidence not admitted to show that a sl of land not mentioned in the schedule or delineated in the plan ha always been occupied as part of the farm: *Barton* v. *Dawes* (1850 10 C. B. 261; 19 L. J. C. P. 302; 84 R. R. 562; and see *B Brocket*; *Dawes* v. *Miller*, [1908] 1 Ch. 185; 77 L. J. Ch. 245.

Where mortgages purported to be transferred in consideration the sums due, evidence was not admitted to show that the transfe were gifts of the mortgage debts": *Cowlishaw* v. *Hardy* (1857 25 Beav. 169, at p. 175; 119 R. R. 375.

Draft referred to in recitals.

A deed recited certain intended testamentary dispositions, an that a draft will had been prepared to carry them out; the grant then disposed of certain property in accordance with the intentio as recited; the recital of the intentions was inconsistent with th

aft will. *Held*, that the draft could not be looked at to correct e recital and disposition of the property: *Re Carter's Trusts* 869), Ir. R. 3 Eq. 495.

Map.

A map attached to, but not referred to in, a conveyance, not dmitted to explain it: *Wyse* v. *Leahy* (1875), I. R. 9 C. L. 34.

Where land was purchased by justices, and the conveyance was ade to the clerk of the peace in "trust for the justices of the ounty of M., for the purposes of the Prison Act, 1865," evidence s to the resolutions passed by the justices prior to the purchase as held inadmissible to prove that the land was not purchased for e purposes of the Prison Act: *The Prison Commissioners* v. *The lerk of the Peace for Middlesex* (1882), 9 Q. B. D. 506; 51 L. J. . B. 433.

Contract for sale.

Contract for sale not admitted to import reservation into onveyance: *Teebay* v. *Manchester, etc. Ry. Co.* (1883), 24 Ch. D. 72; 52 L. J. Ch. 613.

Prospectus of company.

The debenture is the contract between the company and the ebenture-holder. The prospectus cannot be looked at for the urpose of interpreting the contract. *Re Chicago and North-West. ranaries Co., Ltd.*, [1898] 1 Ch. 263; 67 L. J. Ch. 109. *Re ewkesbury Gas Co.; Tysoe* v. *The Co.*, [1911] 2 Ch. 279; 80 . J. Ch. 723; distinguished in *Jacobs* v. *Batavia and General lantations Trust Ltd.*, [1924] 1 Ch. 287; 93 L. J. Ch. 520.

Annuity deed.

Evidence of omission of a proviso for redemption of an annuity as refused, no fraud being alleged: *Lord Irnham* v. *Child* (1781), Bro. C. C. 92; 2 Dick. 554; *Portmore* v. *Morris* (1787), Bro. C. C. 219; *Hare* v. *Shearwood* (1790), 1 Ves. Jr. 241; Bro. C. C. 168; *Haynes* v. *Hare* (1791), 1 H. Bl. 659; R. R. 810.

Agreement.

Specific performance of a written agreement for a lease with a arol variation of one term refused: *Rich* v. *Jackson* (1794), Bro. C. C. 514; 6 Ves. 334, n.

Where a lease contained a covenant for payment of the quarter's nt in advance, evidence of a parol agreement prior to the lease at the landlord would take a bill payable at three months by way payment of the rent was inadmisible. *Henderson* v. *Arthur*, 907] 1 K. B. 10; 76 L. J. K. B. 22.

Bill of sale (of ship).

On the sale of a ship by bill of sale, a representation in a prior ocument, which was void as a conveyance for not reciting the ip's registry and was not an agreement for sale for it did not ate the price, was not allowed to be treated as forming part of e contract, for "wherever the contract is reduced into writing othing that is not found expressed in it can be treated as forming art of it.": *per* Abbott, C.J., *Kain* v. *Old* (1824), 4 Dow. & R. 52,

at p. 61; 2 B. & C. 627, at p. 634; 2 L. J. (o.s.) K. B. 102
26 R. R. 497.

Apparent exceptions.

There is an apparent exception to the rule that no extrinsi evidence is admissible to add to, contradict, vary, or alter th terms of a deed, for such evidence is admissible to alter th statement of the date, and to add to or alter the statement of th consideration, contained in the deed, but this exception is only a apparent and not a real exception, as neither of these matters i fact forms part of the terms of the deed. The date of a deed the date of its delivery, and the statement of the consideratio forms no part of the terms of the deed, but is only a statemen contained in the deed of an antecedent fact.

Date and consideration.

Whole contract not in the deed.

There is also an apparent exception to the rule that no extrinsi evidence is admissible to add to the terms of a deed, for in case where the whole of the contract between the parties is not expresse in the deed, such evidence is admissible to prove that part of th contract which is not expressed in the deed. Such cases may b divided into three classes: (i) where the deed is one of a series (ii) where there is a collateral agreement; and (iii) where add tional terms are implied from custom or usage. This exceptio which is of greater importance than that just mentioned, i however, also an apparent and not a real exception, for th evidence is not admitted to add to the terms of the contrac expressed in the deed, but to show that there existed, besides th contract the terms whereof are expressed in the deed, a further additional contract the terms whereof do not purport to b expressed in the deed, but which is not inconsistent with that, th terms of which are so expressed.

Series of deeds.

Evidence is admissible to show that a deed only one of a series of deeds, which together contai the terms of the contract between the parties.

Defeasance

A common example of this is the case of a conveyance absolu in form, which appears by a separate defeasance to be made onl for the purpose of securing money: *Manlove* v. *Bale* (1688), Vern. 84; 1 Eq. Ca. Abr. 313, pl. 15; *Francklyn* v. *Fern* (1740 Barnard, Ch. Rep. 30.

Indorsements.

Indorsements have in many cases been held to be parts of th deeds: *Broke* v. *Smith* (1603), Moore, 679; *Thompson* v. *Butch* (1627), 3 Buls. 300; *S. C. sub nom. Tomson* v. *Butcher*, Bend 154; *Burgh* v. *Preston* (1800), 8 T. R. 483; 5 R. R. 416; *Lybu* v. *Warrington* (1816), 1 Stark. 162; *Eales* v. *Conn* (1830), 4 Sin 65; 33 R. R. 92; *Brewster* v. *Kidgill* (1697), 12 Mod. 166, p. 171; and in the absence of evidence to the contrary an indors

ent on, or any other apparent alteration in, a deed is assumed have been made before execution.

A note given by the husband to the wife at the time of executing marriage settlement, which in effect made him trustee for her of life estate taken under the settlement, was treated as part of the ttlement : *Tyrrell* v. *Hope* (1743), 2 Atk. 558.

Evidence admissible whether deeds refer to same transaction.

Evidence of the surrounding circumstances is admissible to show hether deeds, not referring to each other, are parts of the same ansaction, or are separate transactions : *Lord Cromwel's Case* 601), 2 Rep. 69 b; *Harman* v. *Richards* (1852), 10 Hare, 81; 2 L. J. Ch. 1066; 90 R. R. 297; *Thompson* v. *Webster* (1859), De G. & J. 600; 28 L. J. Ch. 700; 124 R. R. 409; *Fowler* v. *unter* (1829), 3 Y. & J. 506. See also *Ford* v. *Stuart* (1852), 5 Beav. 493; 21 L. J. Ch. 514; 92 R. R. 524.

Subsidiary agreement.

If a document is not the real agreement but only a subsidiary ocument for carrying out one of the terms of the agreement, it ay be proved that such is the fact. "The written document gned by the plaintiffs and purporting to be a transfer was not (as *Lord Irnham* v. *Child* (1781), 1 Bro. C. C. 92; *Martin* v. *Pycroft* 1852), 2 D. M. & G. 785; 22 L. J. Ch. 94; 95 R. R. 324, and other ses of that class) a contract valid and operative between the arties but omitting, designedly or otherwise, some particular term hich had been verbally agreed upon, but was a mere piece of achinery obtained . . . as subsidiary to and for the purposes of e verbal and only real agreement under circumstances which ould make the use of it, for any purpose inconsistent with that greement, dishonest and fraudulent" : *per* Selborne, L.C., *ervis* v. *Berridge* (1873), L. R. 8 Ch. 351, at p. 359; 44 L. J. Ch. 64.

Collateral agreements.

Evidence is admissible of any collateral agreement as to any matter on which the deed is silent, and not inconsistent with the terms of the deed, and whether constituting a condition precedent to the attaching of any obligations under the deed or not.

"No doubt, as a rule of law, if parties enter into negotiations fecting the terms of a bargain and afterwards reduce it into riting, verbal evidence will not be admitted to introduce lditional terms into the agreement, but nevertheless what is called collateral agreement, where the parties have entered into an agreeent for a lease or for any other deed under seal, may be made consideration of one of the parties executing that deed, unless, course, the stipulation contradicts the terms of the deed itself" : *r* Mellish, L.J., *Erskine* v. *Adeane* (1873), L. R. 8 Ch. 756,

at p. 766; 42 L. J. Ch. 835. "Suppose the parties should make parol contract, with the intention that it should afterwards reduced into writing; and that that which is reduced into writi shall be the only contract, then, of course, one cannot go beyo it; but if they intend, as they might, that there should something outside such contract, they might agree that that shou exist, notwithstanding it was not in the contract which was p into writing. In the same way, when one is dealing with a de by which the property has been conveyed, one must see if it cove the whole ground of the preliminary contract": *per* Bowen, L.J in *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, at p. 357; L. J. Q. B. 348. "Where there is simply a conveyance a nothing more, the terms upon which the conveyance is made n being apparent from the deed itself, collateral evidence may easi be admitted to supply the considerations for which the parti interchanged such a deed; but where in the deed itself the reaso for making it, and the considerations for which it is granted, a fully and clearly expressed, the collateral evidence must be stro enough to overcome the presumption that the parties in maki the deed had truly set forth the causes which led to its execution' *per* Lord Watson, in *Barton* v. *Bank of New South Wales* (189 15 A. C. 379. See also *Henderson* v. *Arthur*, [1907] 1 K. B. 1 76 L. J. K. B. 22.

"Then why is not the warranty collateral to anything which to be found in the lease? The present contract or warranty by t defendant was entirely independent of what was to happen duri the tenancy. It was what induced the tenancy and it in no w affected the terms of the tenancy during the three years, which w all the lease dealt with. The warranty in no way contradicts t lease, and without the warranty the lease never would have be executed": *per* A. L. Smith, M.R., *De Lassalle* v. *Guildfor* [1901] 2 K. B. 215, at p. 222; 70 L. J. K. B. 533. This part the judgment does not appear to be affected by the observatio of Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton*, [191 A. C. 30, at p. 50; 82 L. J. K. B. 245.

Leases. Thus evidence was admitted of a collateral agreement, by landlord to keep down rabbits: *Morgan* v. *Griffith* (1871), L. R. Ex. 70; 40 L. J. Ex. 46; *Erskine* v. *Adeane* (1873), L. R. 8 C 756; 42 L. J. Ch. 835; to put a house into repair: *Angell* v. *Du* (1875), L. R. 10 Q. B. 174; 44 L. J. Q. B. 78, approved *Carter* v. *Salmon* (1880), 43 L. T. 490 (where a collateral agreeme being inconsistent with the express terms of a lease which it w sought to vary was not received in evidence); that an additional re should be paid if rebuilding cost more than a specified sum *Williams* v. *Jones* (1888), 36 W. R. 573; that the drains of a hou

:re in good order: *De Lassalle* v. *Guildford* (*supra*); and that bill of sale should not be made available until the grantee had hausted certain other securities for the advance: *Heseltine* v. *mmons*, [1892] 2 Q. B. 547, see *per* Kay, L.J., at p. 555; L. J. Q. B. 5.

Bill of sale.

Where there was an agreement whereby A was to sell and B us to purchase certain furniture, and whereby A authorised B to ttle an action brought against A on a bill of exchange, and agreed give up the tenancy of certain premises held of B, evidence was mitted of a collateral agreement by B to find the necessary oney and to pay the bill on which A was being sued: *Lindley* v. *icey* (1864), 17 C. B. (N.S.) 578; 34 L. J. C. P. 7; 142 R. R. 525.

Assumed basis of contract.

To the same principle may be referred the case of *Krell* v. *enry*, [1903] 2 K. B. 740; 72 L. J. K. B. 794, in which it was ld (extending the doctrine of *Taylor* v. *Caldwell* (1863), 3 & S. 826; 32 L. J. Q. B. 164, *viz.*, that, where from the nature the contract it appears that the parties must have contracted the basis of the continued existence of some specific thing, they e excused from the performance of the contract by the destruction such specific thing without the contractor's default) that evidence ay be given of "a condition or state of things appearing to have en assumed by the parties to be the foundation or basis of the ntract." See also *Re Shipton, Anderson & Co., etc. Arbitration*, 915] 3 K. B. 676, at p. 683; 84 L. J. K. B. 2137; *Tamplin S.S. . v. Anglo-Mexican Petroleum Products Co.*, [1915] 3 K. B. 668, p. 674; 85 L. J. K. B. 1389; *Modern Transport Co.* v. *Duneric S. Co.*, [1917] 1 K. B. 370; 86 L. J. K. B. 164; *Marshall* v. *anvill*, [1917] 2 K. B. 87; 86 L. J. K. B. 767; and cf. *Metrolitan Water Board* v. *Dick, Kerr & Co., Ltd.*, [1918] A. C. 119; L. J. K. B. 370.

But if the collateral agreement is in writing, then, even if it es add to or vary the terms of the instrument to which it is lateral, it is receivable in evidence: *Jacobs* v. *Batavia and neral Plantations Trust, Ltd.*, [1924] 1 Ch. 287; 93 L. J. Ch.).

Terms implied by custom.

Evidence is admissible of any custom or usage by which terms, not expressly mentioned in, but which are not inconsistent with, or repugnant to, the terms mentioned in the deed, are annexed to contracts of the description contained in the deed.

Implied additional terms.

This rule having reference to *implied* additional terms, must be efully distinguished from one with which it is often confounded, rule, namely, that extrinsic evidence may be used to show the aning that the usage of the business to which the contract

relates has affixed to words or phrases employed in setting forth t *expressed* terms of the contract, which latter rule has be discussed in a former chapter (chap. 4, p. 63).

The distinction is obvious: the rule under considerati introduces additional and unexpressed stipulations into the co tract contained in the deed, while the rule referred to deals wi the manner in which the meaning of the expressed terms of th contract is to be ascertained.

Custom and usage.

"It has long been settled, that, in commercial transactio extrinsic evidence of custom and usage is admissible to ann incidents to written contracts, in matters with respect to which th are silent. The same rule has also been applied to contracts other transactions of life, in which known usages have been esta lished and prevailed; and this has been done upon the principle presumption that, in such transactions, the parties did not mean express in writing the whole of the contract by which they intend to be bound, but a contract with reference to those known usag Whether such a relaxation of the strictness of the common law w wisely applied, where formal instruments have been entered int and particularly leases under seal, may well be doubted; but t contrary has been established by such authority, and the relatio between landlord and tenant have been so long regulated upon t supposition that all customary obligations, not altered by t contract, are to remain in force, that it is too late to pursue contrary course; and it would be productive of much inconvenien if this practice were now to be disturbed": *per* Parke, B., *Hutt* v. *Warren* (1836), 1 M. & W. 466, at p. 475; 5 L. J. Ex. 23 46 R. R. 368.

Custom of trade.

"The custom of trade, which is a matter of evidence, may used to annex incidents to all written contracts, commercial agricultural, and others, which do not by their terms exclude upon the presumption that the parties have contracted wi reference to such usage, if it is applicable": *per* Parke, B *Gibson* v. *Small* (1853), 4 H. L. C. 353, at p. 397; R. R. 138.

"In all contracts, as to the subject-matter of which kno usages prevail, parties are found to proceed with the ta assumption of these usages; they commonly reduce into writing t special particulars of their agreement, but omit to specify the known usages, which are included however, as of course, by mutu understanding: evidence therefore of such incidents is receivab The contract in truth is partly express and in writing, part implied or understood and unwritten. But, in these cases, restriction is established on the soundest principle, that the evider received must not be of a particular which is repugnant to,

Implied, must not be repugnant to expressed, terms.

inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less": *per* Coleridge, J., *Brown* v. *Byrne* (1854), 3 El. & B. 703, at p. 715; 23 L. J. Q. B. 313; 97 R. R. 715.

"In a certain sense, every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations, and be different contracts. To take a familiar instance by way of illustration: on the face of a bill of exchange at three months after date, the acceptor would be taken to bind himself to the payment precisely at the end of the three months; but, by the custom, he is only bound to do so at the end of the days of grace, which vary according to the country in which the bill is made payable, from three up to fifteen. The truth is, that the principle on which the evidence is admissible, is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract unless they expressly exclude them. To fall within the exception therefore, of repugnancy, the incident must be such as, *if expressed in the written contract*, would make it insensible or inconsistent. Thus, to warrant bacon to be 'prime singed,' adding 'that is to say, slightly tainted,' *Yates* v. *Pym* ((1816), 6 Taunt. 446; 16 R. R. 653), or to insure all the boats of a ship and add, 'that is to say, all not slung in the quarter,' *Blackett* v. *Royal Exchange Assurance Co.* ((1832), 2 C. & J. 224; 1 L. J. Ex. 101; 37 R. R. 695), and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down; and therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also": *per* Lord Campbell, C.J., *Humfrey* v. *Dale* (1857), 7 El. & Bl. 266, at p. 274.

Principle on which evidence admitted.

The following are cases on leases:—

Examples. Leases.

Where the lease contained no stipulation as to the subject-matter of the custom, evidence of custom was admitted, in *Wigglesworth* v. *Dallison* (1779), 1 Doug. 201; 1 Sm. L. C. (12th ed.), p. 620; and *Holding* v. *Pigott* (1831), 7 Bing. 465,

as to the right of the tenant to enter and take way-going crops; in *Beavan* v. *Delahay* (1788), 1 H. Bl. 5; 2 R. R. 696, as to his right to leave the way-going crop in a barn on the farm for a certain time after the expiration of the lease; in *Senior* v. *Armitage* (1816), Holt, N. P. C. 197; 17 R. R. 627, as to the duty of the tenant to provide work and materials in his away-going year, and for the landlord to make him a reasonable compensation for the same. Where the stipulation in the lease, though applying to the same subject-matter as the custom, was not inconsistent with it, evidence was admitted in *Hutton* v. *Warren* (1836), 1 M. & W. 466; 5 L. J. Ex. 234; 46 R. R. 368, as to mutual rights of both landlord and tenant in respect of the valuations at the termination of the lease.

Custom excluded.

On the other hand, the custom was excluded as being inconsistent with the lease, in *Boraston* v. *Green* (1812), 16 East, 71; 14 R. R. 297, where the custom was that the outgoing tenant should take to his own use only two-thirds of the way-going crop, and the lease provided that he might take the whole of it, so that it did not exceed twenty-nine acres; in *Webb* v. *Plummer* (1819), 2 B. & Ald. 746; 21 R. R. 249, where by the custom an outgoing tenant was entitled to an allowance for foldage from the incoming tenant, but the lease contained a list of payments to be made by the incoming to the outgoing tenant, which did not comprise an allowance for foldage; in *Roberts* v. *Barker* (1833), 1 Cr. & M. 808; 2 L. J. Ex. 268; 38 R. R. 773, where the custom was that the outgoing tenant should leave the manure for the landlord and should be paid for the same, but the lease contained a stipulation that he would leave it for the landlord, and contained no provision as to payment; and in *Clarke* v. *Roystone* (1845), 13 M. & W. 752; 14 L. J. Ex. 143; 67 R. R. 806, where the demise was merely an agreement in writing for a yearly tenancy.

Evidence of a custom that the landlord should supply materials for the repairs was held to be inadmissible, where the terms of the lease dealt with the particular matter in a way inconsistent with the custom: *Westacott* v. *Hahn*, [1918] 1 K. B. 495; 87 L. J. K. B. 555.

If the custom is proved it must be taken to apply, unless the terms of the written contract exclude it: *Wilkins* v. *Wood* (1848), 17 L. J. Q. B. 319; 80 R. R. 197.

Mercantile contracts.

The following are cases of mercantile contracts, and although most of them relate to documents not under seal, they are inserted as illustrating the general principle.

Policies of marine insurance.

Where policies of marine insurance were in the ordinary form, it was held that a deviation to the river Elbe on a voyage from Bremen to London, though in fact out of the way, was no deviation,

for at the date of the voyage there was no convoy for ships directly from Bremen to London: *Bond* v. *Gonsales* (1704), 2 Salk. 445; Holt, 469; that a departure from the Downs without convoy to the place of rendezvous for the convoy at Spithead was no breach of warranty to depart with convoy: *Gordon* v. *Morley* and *Campbell* v. *Bordieu* (1746), 2 Stra. 1264; that sails taken out of a ship and warehoused while the ship was being cleaned: *Pelly* v. *Royal Exchange Assurance Co.* (1757), 1 Burr. 341, 350, and that goods remaining on board the ship for a long time after arrival: *Noble* v. *Kennoway* (1780), 2 Doug. 510, are covered by the policy; that goods in public lighters are not, but in the consignee's own lighters are, safely landed: *Rucker* v. *London Assurance Co.* (1784), 2 Bos. & Pul. 432, n.; that the provisions of the crew discharged on to an island in the Canton river for the purpose of re-fitting the ship were covered by the policy: *Brough* v. *Whitmore* (1791), 4 T. R. 206; 2 R. R. 361; that goods stowed on deck and jettisoned are not covered by the policy: *Miller* v. *Tetherington* (1862), 7 H. & N. 954; affirming 6 H. & N. 278.

Custom excluded.

On the other hand, evidence was not admitted to prove a custom that underwriters never pay for the loss of boats outside the ship, slung upon the quarter, on the ground that such evidence would have contradicted the written contract: *Blackett* v. *Royal Exchange Assurance Co.* (1832), 2 Cr. & J. 244; 1 L. J. Ex. 101; 37 R. R. 695; or to prove a custom that underwriters in London insuring money advanced on freight are not bound to make good a general average, where the contract was that they should pay general average: *Hall* v. *Janson* (1855), 4 El. & Bl. 500.

Charter-parties.

Where the engagement was to pay at so much per ton for goods shipped at Bombay, cotton to be calculated at fifty cubic feet per ton, evidence was admitted of a custom to pay according to the measurement taken at Bombay before the goods are loaded: *Bottomley* v. *Forbes* (1838), 5 Bing. N. C. 121; 8 L. J. C. P. 85; 50 R. R. 629. Where the defendant agreed to load a full and complete cargo of sugar at Trinidad, evidence was admitted to prove a custom at Trinidad that the sugar was to be loaded in hogsheads, and not otherwise: *Cuthbert* v. *Cumming* (1855), 10 Ex. 809; 11 Ex. 405; 24 L. J. Ex. 193, 310. Evidence was admitted to show that, by usage of trade, agents signing a charter-party for undisclosed principals are personally liable, if the principals are not disclosed within a reasonable time: *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260.

Custom excluded.

On the other hand where the vessel was to deliver at H, "or near thereto as she could safely get," "to discharge as customary," and she could not safely get to H, evidence of a custom of the port of H, that the merchant was not bound to

accept delivery otherwise than at H, was rejected as being inconsistent with the written contract: *Hayton* v. *Irwin* (1879), 5 C. P. D. 130.

So in the case of *The Alhambra* (1881), 6 P. D. 68; 50 L. J. P. 36, the Court of Appeal held that a custom for vessels to be lightened in Lowestoft roads was inconsistent with the terms of the charter-party, and therefore not admissible to aid the construction of the charter-party. See also *Re an Arbitration between L. Sutro & Co., and Heilbut, Symons & Co.*, [1917] 2 K. B. 348; 86 L. J. K. B. 1226.

And where the ship was "to be consigned to the charterer's agents in China free of commission on this charter," and the custom was alleged that whenever a ship, chartered in London for China, is agreed to be consigned to the charterer's agents, whether consigned free of commission on that charter or not, it is the right and duty of the agents as the consignees of the ship, to procure a charter or cargo for the ship for any voyage from the port; and that they are entitled to be paid the usual brokers' commission on the amount of the freight payable under such charter, unless excluded by special contract; but that in case the owners of a ship procure a charter or cargo for a voyage from the port without any default of the consignees, the latter are entitled to the broker's commission on any freight payable under any such charter-party, unless such right is excluded by special contract. It was held on demurrer that the custom could not be imported into the contract, as it added a new term to it, and did not only explain particular expressions: *Phillipps* v. *Briard* (1856), 1 H. & N. 21.

Bought and sold notes.

Evidence was admitted of a custom that sale should be by sample: *Syers* v. *Jonas* (1848), 2 Ex. 111; 76 R. R. 515; *O'Neill* v. *Bell* (1866), Ir. R. 2 C. L. 68.

Sale of "fifty tons best oil expected to arrive per the *Chalco*, at £40 per ton; wet, dirty, and inferior oil, if any, at a fair allowance." The oil arrived containing only one-fifth of "best oil." *Held*, that usage might be proved that such a contract was satisfied if the oil delivered contained a substantial portion of best oil: *Lucas* v. *Bristow* (1858), El. B. & El. 907.

Sale of barley, to be about as per sample. *Held*, that a custom of the London Corn Exchange that the buyer was not entitled to reject for difference in quality unless the same was excessive or unreasonable was a good custom: *Re Arbitration between Walker and Others and Shaw, Son & Co.*, [1904] 2 K. B. 152; 73 L. J. K. B. 325.

Evidence of usage of trade was admitted to show that where a broker purchased without disclosing the name of his principal

he was liable to be looked upon as the purchaser: *Humfrey* v. *Dale* (1857), 7 El. & Bl. 266; *S. C.* affirmed on appeal *sub nom.* *Dale* v. *Humfrey* (1858), El. Bl. & El. 1004; *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; and *Imperial Bank* v. *London and St. Katharine Docks Co.* (1877), 5 Ch. D. 195; 46 L. J. Ch. 335. See also Pollock on Cont. (9th ed.), pp. 117 *et seq.*: Smith's Merc. Law (12th ed.), Bk. I. c. 5, p. 214.

Custom excluded.

But evidence was not admitted of the following alleged customs, *viz.*: to insert the names of vendors' brokers in the contract when the principals were indebted to them, for the purpose only of securing that the purchase-money should pass through their hands: *Jones* v. *Littledale* (1837), 6 Ad. & El. 486; 6 L. J. K. B. 169; 45 R. R. 542; to accept bacon slightly tainted as "prime singed" bacon: *Yates* v. *Pym* (1816), 6 Taunt. 446; 16 R. R. 653; to reject undisclosed principal, and look to broker for fulfilment of contract: *Trueman* v. *Loder* (1840), 11 Ad. & El. 589; 9 L. J. Q. B. 165; 52 R. R. 451 (on which see 2 Sm. L. C. 387-9 (12th ed.), notes to *Thomson* v. *Davenport*, and Lord Campbell's judgment in *Humfrey* v. *Dale*, 7 El. & Bl. 266, at p. 277); to give credit: *Ford* v. *Yates* (1841), 2 M. & Gr. 549; 10 L. J. C. P. 117; 58 R. R. 471; that vendors were entitled to retain goods till payment: *Spartali* v. *Benecke* (1850), 10 C. B. 212; 19 L. J. C. P. 293; 84 R. R. 532; (but see *Field* v. *Lelean* (1861), 30 L. J. Ex. 168; 6 H. & N. 617); the terms of the bought and sold note being in each case repugnant to the custom.

And the usage that where a broker purchases without disclosing the name of his principal he is liable to be looked upon as the purchaser, is inconsistent with a clause that in case of dispute the matter is to be referred to the arbitration of the broker, and evidence of such usage was therefore rejected: *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635.

Bill of lading.

Where the master of a ship agreed to take out to certain places "a boat" of specified dimensions, he was allowed to prove a usage to take the deck off such a boat when stowed on board ship: *Haynes* v. *Holliday* (1831), 7 Bing. 587; 9 L. J. (o.s.) C. P. 179; 33 R. R. 480.

Freight to be "five-eighths of a penny sterling per pound, with five per cent. primage, and average accustomed." Evidence admitted to prove that, according to usage, three months' interest was deducted from the freight on goods coming from certain ports: *Brown* v. *Byrne* (1854), 3 El. & Bl. 703; 23 L. J. Q. B. 313; 97 R. R. 715.

Miscellaneous.

An architect, employed by the defendants to draw specifications of the plan of a new workhouse, employed the plaintiff to take out the quantities; the defendants refused to allow the

building to proceed. *Held*, in an action by the plaintiff for his remuneration, that he might prove a usage in the trade for architects to have the quantities taken out by surveyors : *Moon* v. *Whitney Union* (1837), 3 Bing. N. C. 814; 6 L. J. C. P. 305; 43 R. R. 802.

Written contract that plaintiff should perform at defendant's theatre, and that defendant should engage her for *three years*, and pay a salary of £5, £6, and £7 per week in those years respectively : evidence was admitted to show that, according to the usage of the profession, the plaintiff was only to be paid during the theatrical season in each year : *Grant* v. *Maddox* (1846), 15 M. & W. 737; 16 L. J. Ex. 227; 71 R. R. 815.

It has been held by Cotton, Brett, and Bramwell, L.JJ., that where goods are ordered of a manufacturer of such goods, evidence is admissible of a usage in the particular trade that the goods delivered shall be of the manufacturer's own make, and by Cotton and Brett, L.JJ. (Bramwell, L.J., *dissentiente*), that in the absence of an express term to the contrary it is an implied term in such a contract that the goods shall be of the manufacturer's own make, but that evidence of a usage to the contrary in the particular trade is admissible : *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438; 50 L. J. Q. B. 753.

Where one of the parties is ignorant of usage.

The rule does not apply where one of the parties is ignorant of the usage; at all events, where it is not the usage of the whole trade, but merely of some of the persons engaged in the trade. Thus, where it was found by the jury that a certain usage as to policies prevailed amongst the underwriters frequenting Lloyd's, and merchants effecting policies there, and the plaintiff effected a policy there, but it was not found that he was in the habit of frequenting the place, it was held that he was not bound by the usage : *Gabay* v. *Lloyd* (1825), 3 B. & C. 793; 3 L. J. (o.s.) K. B. 116; 27 R. R. 486; *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802; 44 L. J. C. P. 362; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466; but in *Norden Steam Co.* v. *Dempsey* (1876), 1 C. P. D. 654; 45 L. J. C. P. 764, a new trial was ordered on the ground that evidence of a usage of the port of Liverpool had been improperly rejected as inapplicable to the interpretation of a contract between a foreign shipowner and a Liverpool merchant.

The whole question of admitting evidence of custom or usage is further discussed in the notes to *Wigglesworth* v. *Dallison*, 1 Sm. L. C. (12th ed.), p. 620; Leake on Contracts (7th ed.), Pt. I, c. 4, s. 2, pp. 131—138; Pt. II, c. 2, s. 3, pp. 366, 367; Chitty on Contracts (17th ed.), c. 5, s. 12, pp. 129 *et seq.*; Woodfall, Landl & Tent. (21st ed.), c. 5, s. 4, p. 171; s. 9, p. 222; c. 20, ss. 4, 5

). 923—928, 934; Smith, Landl. & Tent. (3rd ed.), p. 307; Steph. ig. Ev. Art. 90; Taylor on Evidence (11th ed.), ss. 1168 *et seq.*

Extrinsic evidence admissible to show that deed is not binding.

Extrinsic evidence is admissible for the purpose of showing that the deed is not binding on the parties either on the ground of infancy, coverture, lunacy, fraud, mistake, accident, or duress, or on the ground of its having been made for some unlawful consideration, such as to compound a felony, or as *premium pudicitiae*, or of its having been delivered as an escrow, subject to the performance of a condition which has not been fulfilled.

Of course this proposition is no exception to the rule that xtrinsic evidence is not admissible for the purpose of adding to, ontradicting, varying, or altering the terms of the deed, as the vidence is adduced not for the purpose of interpreting the deed, ut for the purpose of showing that the deed ought not to be terpreted. The parties may show that they never came to an greement on the terms of the written document, or at all: *Pym . Campbell* (1856), 6 E. & B. 370; 25 L. J. Q. B. 277; 106 . R. 632; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; 66 L. J. Ch. 4.

"No doubt there is an equity under some circumstances to t aside a deed. There is an equity to rectify a deed. But it ust be judicially set aside or rectified, and unless and until that done it is a violation of first principles to allow evidence as to e meaning and intention of parties when there is an actual greement in writing, the record of that meaning and intention": r James, L.J., *Ex p. Morgan* (1875), 2 Ch. D. 72, at p. 84; L. J. Bk. 76; and see *Collins* v. *Blantern* (1766), 2 Wils. 341; Sm. L. C. (12th ed.), p. 413.

Subsequent admissions or conduct inadmissible to construe deed unless there is ambiguity in instrument or primary evidence of such is unobtainable.

Prima facie, it would appear that the subsequent admission as to the true meaning of a deed by, or the subsequent conduct of, a party to, or person claiming under a deed cannot be received to explain or alter the construction of a deed which can be fairly construed without ambiguity; but where there is any ambiguity in the deed, or where only secondary evidence of the deed is available, *semble*, such admissions or such conduct may properly be received in order to show the true meaning of the

deed in which the ambiguity occurs or of whic primary evidence is not forthcoming.

Settlement.

Voluntary settlement not controlled by subsequent letter settlor : *Clavell* v. *Littleton* (1710), Pre. Ch. 305.

Subsequent will of one of the parties not admitted to a construction of settlement : *Doran* v. *Ross* (1789), 1 Ves. Jr. 5 at p. 59.

Leases.

A covenant for renewal contained in a lease held to be satisfi without a further covenant for renewal, and evidence of vario other leases successively made containing such a covenant n admitted : *Iggulden* v. *May* (1804), 9 Ves. 325; (1806), 7 Eas 237, at p. 244 (where Lord Ellenborough distinguishes *Cooke Booth* (1778), 2 Cowp. 819, where evidence of a continuous seri of successive renewals was admitted), and on appeal (1807), 2 Bo & P. N. R. 449, at p. 451; 82 R. R. 623 (where *Cooke* v. *Boo* (*supra*) is disapproved, as it was also in *Baynham* v. *Guy Hospital* (1796), 3 Ves. 295, at p. 298); and for the princip adopted in construing covenants of perpetual renewal in a leas see *Wynn* v. *Conway Corporation*, [1914] 2 Ch. 705. See al *Sherwood* v. *Tucker*, [1924] 2 Ch. 440.

Conveyance.

Where a deed purported to convey a messuage in the occupati of A *with the appurtenances*, and it was proved that A was in t occupation of a small adjoining garden, it was held that, the gard having passed as appurtenant to the messuage, the declarations the grantee that he had not purchased the garden, were inadmissib to contradict the deed : *Doe* d. *Norton* v. *Webster* (1840), 12 A. E. 442; 4 P. & D. 270; 9 L. J. Q. B. 373; 54 R. R. 597.

Mining leases.

Where a lease of a coal mine contained a covenant by the less to pay to the lessor a certain share of all sums of money for whi the coal should sell at the pit's mouth, evidence that the less had accounted for and paid to the lessor the same share of mon produced by the sale of coals elsewhere, was not allowed to given in explanation of the covenant : *Clifton* v. *Walmesley* (179 5 T. R. 564; 90 R. R. 900; *Simpson* v. *Margitson* (1847), Q. B. 23; 17 L. J. Q. B. 81; 75 R. R. 278; *N. E. Ry. Co. Hastings*, [1900] A. C. 260; 69 L. J. Ch. 516.

Draft lease, which was not objected to by the lessee, w refused to complete, inadmissible to prove the terms of the co tract : *Haywood* v. *Cope* (1858), 25 Beav. 140; 27 L. J. Ch. 46

Evidence of conduct.

Evidence of the conduct of the parties admissible to test t accuracy of secondary evidence of a deed : *Sadlier* v. *Biggs* (185 4 H. L. Cas. 435; 94 R. R. 172.

"The intention of the parties must be collected from t language of the instrument, and may be elucidated by the condu

ey have pursued" : *per* Park, J., in *Chapman* v. *Bluck* (1838), Bing. N. C. 187, at p. 195; 7 L. J. C. P. 100.

"The subsequent conduct of the parties is evidence to assist showing upon what terms the plaintiff was put into possession" : Bing. N. C., at p. 196.

"It is quite true that if the language of the grant itself were solutely plain and unambiguous, no amount of user would evail against the plain meaning of the words : see *N. E. Ry. Co.* *Hastings*. It is, however, impossible to contend that the nguage of this instrument can be so represented. The language very wide, but when one finds such a recital as this : 'The mpany have been authorised to take possession of several portions land, and have ever since been and now continue in possession ereof, but no grant has been made to the Land Company' : when ese are the circumstances under which the grant is actually ade, why is it not evidence, and cogent evidence, when the taking ssession of the particular piece of land is proved, and the con- nuance in possession before and after the grant is proved? e time when, and the circumstances under which, an instru- ent is made supply the best and surest mode of expounding it, d when the obvious intention is to give a title to what has been taken and retained before the actual grant, it is manifest that at has been so taken and retained is cogent evidence of what granted" : *per* Lord Halsbury, in *Van Diemen's Land Co.* v. *ble Cape Marine Board*, [1906] A. C. 92, at p. 97; 75 L. J. C. 28. See also *Watcham* v. *East Africa Protectorate*, [1919] C. 533; 87 L. J. P. C. 150.

Partnership.

As to the practice of allowing evidence to be given in partner- p cases of the conduct of the parties inconsistent with the terms the written articles, as in *Const* v. *Harris* (1824), Turn. & R. 6, at p. 523; 24 R. R. 108; *Geddes* v. *Wallace* (1820), 2 Bligh,); *Jackson* v. *Sedgwick* (1818), 1 Swanst. 460; *Pettyt* v. *Janeson* 819), 6 Madd. 146; *Simmons* v. *Leonard* (1844), 3 Hare, 581; *sten* v. *Boys* (1858), 2 De G. & J. 626; 27 L. J. Ch. 714; *gland* v. *Curling* (1844), 8 Beav. 133, at p. 137; *Coventry* v. *rclay* (1863), 33 Beav. 1; *Pilling* v. *Pilling* (1865), 3 De G. J. & . 162; *Ex p. Barber* (1870), 5 Ch. D. 687; *Lawes* v. *Lawes* (1878), Ch. D. 98, such evidence is not admitted to construe the deed, for the purpose of showing that the partners have by consent ndoned the articles and substituted therefor other provisions, partners may do by conduct as well as by express words : rtnership Act, 1890, s. 19.

CHAPTER IX.

ANCIENT DOCUMENTS.

Contemporaneous Interpretation: Usage: What Usage Mean Modern Usage: Clear Words not Controlled by Usage: Wh is an Ancient Document: Construction of Modern Statutes.

Difficulty produced by lapse of time in obtaining evidence of meaning of words.

THE longer the period that elapses between the time executing and the time of interpreting a document, the greater the difficulty in obtaining direct evidence as to the meaning the words employed; and if the document is very ancient, th difficulty becomes insuperable. When this is the case, the meanin of the words can sometimes be arrived at with a fair degree certainty by ascertaining what was the interpretation placed the document immediately after its execution. The probabilit is great that at that time there were some persons whose intere it was to insist upon the document being properly interpreted, an the fact that a particular interpretation was then placed on affords a great probability of the correctness of such particul interpretation; and this probability is increased if it is found th during a long course of years such interpretation has bee acquiesced in.

Contemporaneous interpretation.

Evidence is admissible as to the interpretatio placed upon an ancient document by persons wh lived at, or at a time not remote from, the time the execution of the document.

The interpretation placed upon a document by persons wh lived at the time of its execution is usually called "conter poraneous" interpretation, and sometimes (though incorrectl because usage implies duration), "the interpretation placed up it by contemporaneous usage."

Contemporaneous usage.

"*Contemporanea expositio est fortissima in lege*": Cok 2nd Inst. 136.

"In the construction of ancient grants and deeds, there is better way of construing them than by usage, and *contemporan expositio* is the best way to go by": *per* Lord Hardwicke, C

t.-Gen. v. *Parker* (1747), 3 Atk. 576, at p. 577; *Waterpark* v. nnell (1859), 7 H. L. Cas. 650, at p. 684; 115 R. R. 317.

In admitting evidence of the acts of the owners of allotments der an Inclosure Act to explain an ambiguous award, it was d: "If the road was improperly set out at first, there were rsons enough interested in contesting it who would not have quiesced so long": *per Curiam*, *Wadley* v. *Bayliss* (1814), 5 unt. 752, at p. 753; 15 R. R. 645.

"If it is shown as it seems to be here that the donor permitted thout objection a certain usage with regard to the surplus funds a number of years, that is rather strong proof of what s intended": *per* Brougham, L.C., *Att.-Gen.* v. *Brazenose llege* (1834), 2 Cl. & F. 295, at p. 317; 1 L. J. Ch. 66; 37 R. 107.

Evidence of "the early and contemporaneous application of the nds of the charity itself by the original trustees under the deed" s held by Tindal, C.J., to be admissible to construe the deed: *ore* v. *Wilson* (1842), 9 Cl. & F. 355, at p. 569.

"One of the most settled rules of law for the construction of biguities in ancient instruments is, that you may resort to conporaneous usage to ascertain the meaning of the deed; tell me at you have done under such a deed, and I will tell you what at deed means": *per* Sugden, C., *Att.-Gen.* v. *Drummond* 842), 1 Dr. & War. 353, at p. 368; and this principle is equally plicable in the case of a modern instrument: *Watcham* v. *East rica Protectorate*, [1919] A. C. 533; 87 L. J. P. C. 150.

"Contemporaneous usage is, indeed, a strong ground for the erpretation of doubtful words and expressions": *per* Lord ttenham, *Drummond* v. *Att.-Gen.* (1849), 2 H. L. C. 837, at 861; 81 R. R. 433.

"In construing such an instrument" (*viz.*, an ancient instrunt), "you may look to the usage to see in what sense the words re used at that time": *per* Lord Campbell (1849), 2 H. L. C., p. 863.

Ambiguity in word "usage."

It will be observed that there is an ambiguity in the word sage" as employed in these judgments; it may mean either ge under the instrument, or the ordinary usage of society, which the date of the deed affixed to the words in it a meaning erent from that which they now bear; but a comparison of judgments with those of Sugden, C., in the same case, *ubi ra*, will show that the word was used in the former meaning, usage under the instrument.

"The contemporaneous exposition is not confined to user under deed. All circumstances which can tend to show the intentions the parties whether before or after the execution of the deed

itself may be relevant" : *per* Lord Halsbury, *Van Diemen's La Co.* v. *Table Cape Marine Board*, [1906] A. C. 92, at p. 98; L. J. P. C. 28.

Contemporanea expositio applied to statutes.

It is perhaps worth noticing that the rule of *contemporan expositio* is often applied to the interpretation of statutes : *Sheppa* v. *Gosnold* (1671), Vaugh. 159, at p. 169; *R.* v. *Scot* (1790), 3 T. 602; *Corporation of Newcastle* v. *Att.-Gen.* (1845), 12 Cl. & 402, at p. 419; 69 R. R. 111; *R.* v. *Archbishop of Canterbu* (1848), 11 Q. B. 483, at p. 581; 17 L. J. Q. B. 252; 75 R. 458; *Montrose Peerage Case* (1853), 1 Macq. H. L. 401. Bu following the ordinary rule, the Courts are not influenced in t

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interpretation of a statute by anything that occurred in Parliame during the passing of the statute : *Gorham* v. *Bishop of Exet* (1850), 5 Ex. 630, at p. 667; 19 L. J. Ex. 376; 82 R. R. 79 *Barbat* v. *Allen* (1852), 7 Ex. 609, at p. 616; 21 L. J. Ex. 15 *Richards* v. *McBride* (1881), 8 Q. B. D. 119, 123; 51 L. M. C. 15.

Disturbance of long-accepted interpretation of statute.

The interpretation of a statute by the Courts, as evidenced b a series of decisions followed and acted upon for centuries, di turbed : *Bourne* v. *Keane*, [1919] A. C. 815; 89 L. J. Ch. 17.

Evidence of usage.

Evidence of the usage under an ancient doc ment is admissible to explain any obscurity ambiguity, but not to contradict its clear an unambiguous terms.

Usage explained.

By *usage* is meant the acts habitually done with reference some particular matter during a long period; and when such ac have been done by persons purporting to act under a documen they afford the best possible evidence as to the interpretati which those persons placed upon it. Occasional deviations fro the regular course will not negative the existence of a consiste usage, for "it follows almost necessarily from the imperfection a irregularity of human nature that a uniform course is not preserv during a long period. A little advance is made at one time, retreat at another; something is added, or taken away, fro indiscretion or ignorance or through other causes; and when the lapse of years the evidence is lost which would explain these irregularities, it must not be too hastily assumed that the receiv construction is therefore incorrect : *R.* v. *Archdall* (1838), 8 Ad. El. 281, at p. 288; 47 R. R. 583.

"Ancient charters, whether they be before time of memory, after, ought to be construed as the law was taken when the chart was made, and according to ancient allowance. . . . And wh any claimed before the Justices in Eyre any franchises by

cient charter, though it had express words for the franchises imed; or if the words were general, and a continual possession aded of the franchises claimed, or if the claim was by old and scure words, and the party in pleading, expounding them to the urt, and averring continual possession according to that exposi-n; the entry was ever *Inquiratur super possessionem et usum*, ., which I have observed in divers records of those Eyres, reeable to that old rule, *Optimus interpres rerum usus*" : Coke, d Inst. 282; and see *Abbot of Strata Mercella's Case* (1591), Rep. 23 b, at pp. 27 b, 28 a.

Clear words not overturned by usage.

"Suppose the words of the charter are doubtful, the usage in is case is of great force; not that usage can overturn the clear rds of a charter : but if they are doubtful, the usage under the arter will tend to explain the meaning of them; especially in a se like this, where, before the charter, the corporation consisted an indefinite number of burgesses by prescription, and where the arter itself added no new members, but only incorporated the old es" : *per* Lord Mansfield, C.J., *R.* v. *Varlo* (1775), 1 Cowp. 248, p. 250.

"However general the words of the ancient deeds may be they e to be construed by evidence of the manner in which the thing s always been possessed and used" : *per* Ellenborough, C.J., *eld* v. *Hornby* (1806), 7 East, 195, at p. 199; 8 R. R. 608.

Clear words not overruled.

"In the case of a grant, no usage, however long, can counter-il the clear words of the instrument, for what is done under urpation cannot constitute a legal usage : but, it is equally clear, at when a grant of remote antiquity contains general words, the st exposition of such a grant is long usage under it. Unless, erefore, the usage of forty years ago can be proved to have ginated in usurpation, it is evidence whence usage anterior to at time may be presumed : and such a length of modern usage, nnected with the ancient usage, affords the strongest exposition the meaning of the original grant" : *per* Dallas, C.J., *Chad* v. *sed* (1821), 2 Brod. & Bing. 403, at p. 406; 23 R. R. 477; Moore, 185, at p. 192.

"There can be no doubt that to ascertain the meaning of an cient grant describing lands as 'the territory of Clandeboy,' rol evidence of acts of ownership is admissible, as showing what at territory included" : *per* Walsh, M.R., *Re Belfast Dock Act* 867), Ir. Rep. 1 Eq. 128, at p. 141.

Even evidence of modern usage is admissible.

Modern usage.

"I have no doubt that all ancient documents, where a question ses as to what passed by a particular grant, can be explained by dern usage" : *per* Parke, B., *Beaufort* (*Duke of*) v. *Swansea*

(*Mayor of*) (1849), 3 Ex. 413, at p. 425; 77 R. R. 677; followe by Malins, V.-C., *Corporation of Hastings* v. *Ivall* (1874), L. I 9 Ch. 758; 43 L. J. Ch. 728; *Duke of Devonshire* v. *Pattinso* (1887), 20 Q. B. D. 263, at p. 275; 57 L. J. Q. B. 189.

"As with respect to ancient deeds the state of the subject their date can seldom if ever be proved by direct evidence, mode usage and enjoyment for a number of years is evidence to raise presumption that the same course was adopted from an earli period and so to prove contemporaneous usage and enjoyment the date of the deed": *per* Lord Wensleydale, *Waterpark* *Fennell* (1859), 7 H. L. C. 650, at p. 684; 115 R. R. 317; and the case of a modern deed, see *Watcham* v. *East Africa Pr tectorate*, p. 155 (*supra*).

"Wherever an old deed is ambiguous in its terms, modern us affords material aid in the elucidation of its meaning": *p* Willes, J., *Simpson* v. *Dendy* (1860), 8 C. B. (N.S.) 433, at p. 47 125 R. R. 725.

"It is not to be disputed that when the necessity of the ca requires it, evidence of more recent usage and custom may adduced for the purpose of explaining old or obsolete, or eve imperfect expressions to be found in ancient documents": *p* Bacon, V.-C., *Earl de la Warr* v. *Miles* (1880), 17 Ch. D. 535, p. 573; 50 L. J. Ch. 754.

"Usage continued during living memory, when there is nothi to the contrary, and when the question is one of prescription, ma no doubt justify the presumption of a similar usage as of rig from time immemorial": *per* Lord Selborne, C., *Neill* v. *Devo shire* (*Duke of*) (1882), 8 A. C. 135, at p. 156.

Rule not applicable where deed is clear.

The rule does not apply where the constructio of the deed is clear.

The quotations from the judgments of Lord Mansfield, C.J *R.* v. *Varlo* (1775), 1 Cowp. 248, at p. 250, and of Dalla C.J., in *Chad* v. *Tilsed* (1821), 2 Brod. & Bing. 403, at p. 40 5 Moore, 185, at p. 192 (*supra*), are authorities for th proposition.

"If there is a deed which says, according to its true constru tion, one thing, you cannot say that the deed means something els merely because the parties have gone on for a long time so unde standing it": *per* Cranworth, C., *Sadlier* v. *Biggs* (1853), H. L. C. 435, at p. 458; 94 R. R. 172. See also *Boldero* v. *Ea India Co.* (1858), 26 Beav. 316, at p. 344; *Att.-Gen.* v. *Dartmou Corporation* (1883), 48 L. T. 933.

"If the words of an ancient grant are ambiguous and leave in doubt whether a particular place is or is not included in i

lence of acts of ownership is plainly receivable to show to what grant extends. On the other hand, if the grant on its true struction excludes the place in question, it is equally plain t proof of such acts is not receivable, for in that case to admit m would be to vary the written document by parol evidence" : Walsh, M.R., *Re Belfast Dock Act* (1866), Ir. R. 1 Eq. 128, p. 139.

"The necessity" for introducing evidence of usage "must be arent—the ambiguity must be found to be existing" : *per* on, V.-C., *Earl de la Warr* v. *Miles* (1880), 17 Ch. D. 535, at 573; 50 L. J. Ch. 754.

Express words not to be contradicted.

There can only be placed on the words of the document a aning that they properly bear, there cannot be placed on the ds a meaning that they cannot bear, and there cannot be put the document such an interpretation as will contradict its ress words : *Withnell* v. *Gartham* (1795), 6 T. R. 388, at 398; 3 R. R. 218; *King* v. *Salway* (1829), 9 B. & C. 424; *.-Gen.* v. *Fishmongers' Co.* (*Preston's Will*) (1841), 5 My. & Cr. 50 R. R. 133; *Att.-Gen.* v. *Ewelme Hospital* (1853), 17 Beav. ; 22 L. J. Ch. 846; 99 R. R. 185; *Att.-Gen.* v. *St. Cross spital* (1853), 17 Beav. 435; *Att.-Gen.* v. *Clapham* (1855), e G. M. & G. 591; 24 L. J. Ch. 177; 102 R. R. 296; *Simpson Dendy* (1860), 8 C. B. (N.S.) 433; 125 R. R. 175; *Att.-Gen.* v. *John's Hospital* (1865), 2 De G. J. & S. 621; *Earl de la Warr Miles* (*supra*); *Neill* v. *Devonshire* (*Duke of*) (1882), 8 A. C. , at p. 156. Cf. *Re Campden Charities* (1881), 18 Ch. D. 310; L. J. Ch. 646.

Examples where usage admitted.

The following are examples of cases where evidence of usage been admitted :—

Pratum.

Ancient admissions to copyholds by the description of "*tres as prati*," followed by modern admissions to "*three acres of adow*," held on evidence of long usage to pass the *prima tonsura* ore-crop only : *Stammers* v. *Dixon* (1806), 7 East, 200; 8 R. R.

Wreck.

An ancient grant of wreck was held on evidence of long usage to e passed the exclusive right to the soil of a small bay : *Chad* v. *ed* (1821), 2 Brod. & Bing. 403; 5 Moore, 185; of manor and ck to have passed the sea-shore between high- and low-water k : *Calmady* v. *Rowe* (1844), 6 C. B. 861; 77 R. R. 502; of the ory of H., and also four islands to the said priory belonging, vit, the island called S., containing three acres, etc., with large eral words granting wreck of the sea, flotsam, jetsam, etc., have passed the sea-shore between high- and low-water mark : *ly* v. *Thorne* (1870), Ir. R. 4 C. L. 495; see also *Hamilton* v. *.-Gen.* (1880), 5 L. R. Ir. 555, another case on the same charter,

and *Brew* v. *Haren* (1874), Ir. R. 9 C. L. 29; (1877), Ir. R 11 C. L. 198.

Pastura. Evidence of user admitted to show that the soil passed by surrender of "*pasturam bosci et subbosci de Haydwood*": *Doe* *Beviss* (1849), 7 C. B. 456; 18 L. J. C. P. 128; 77 R. R. 712.

Manor. Ancient grants of manors held, on evidence of usage which w of so long standing that it might be presumed to be conte poraneous with the grant itself, to include the sea-shore betwe high- and low-water mark: *Beaufort* (*Duke of*) v. *Swansea* (*Mayo etc., of*) (1849), 3 Ex. 413; 77 R. R. 677; *Att.-Gen.* v. *Jon* (1863), 2 H. & C. 347; 33 L. J. Ex. 249; 133 R. R. 711; Stua Moore on the History and Law of the Shore and Foreshor p. 681.

Village. The mountain of S., containing 1,700 acres, held by evidence usage to have passed by an old demise of "the village of S. a part of W. and T. containing by estimation 148 acres": *Waterpa* v. *Fennell* (1859), 7 H. L. C. 650; 115 R. R. 317; and see Brov on Usages and Customs, pp. 32 *et seq.*

Right of election. A power of nominating a schoolmaster, given to "the vicar a his successors and the churchwardens for the time being," held evidence of usage to be well exercised by the vicar and a majori of the churchwardens: *Withnell* v. *Gartham* (1795), 6 T. R. 38 A further case on the right of election is *R.* v. *Dulwich Colle* (1851), 17 Q. B. 600.

Grammar school. "When a school is instituted as a free grammar-school witho more, it is a school to teach the elements of the learned language yet . . . if there was an ancient free grammar-school, and if all times something more had been taught in it than merely t elements of the learned languages, that usage might ingraft up the institution a right to have a construction put upon the endo ment different from what would have been put upon it if a differe usage had obtained": *per* Lord Eldon, C., *Att.-Gen.* v. *Hartl* (1820), 2 J. & W. 353, at pp. 378, 379; 22 R. R. 167.

Charitable trusts. Further cases to the same effect are: *Att.-Gen.* v. *Mayor* *Bristol* (1820), 2 J. & W. 294, at p. 321; 22 R. R. 136; *Att.-Ge* v. *Brazenose College* (1834), 2 Cl. & F. 295; 1 L. J. Ch. 6 37 R. R. 107; *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at p. 56 57 R. R. 2; *Att.-Gen.* v. *Corporation of Boston* (1847), 1 De Gex Sm. 519; *Att.-Gen.* v. *Murdoch* (1851), 1 De G. M. & G. 86; L. J. Ch. 694; 91 R. R. 41; *Re Campden Charities* (1881), Ch. D. 310; 50 L. J. Ch. 646; and the point is discussed in Lew on Trusts (12th ed.), c. xxi, s. 18, p. 627; Tudor on Charita Trusts (4th ed.), c. v, pp. 160 *et seq.*

Interpretation by usage is recognised in the case of charita trusts by the Acts 7 & 8 Vict. (1844), c. 45, s. 2, and 23 & 24 Vi

360), c. 134, s. 5, which apply respectively to Protestant ssenters and Roman Catholics.

Charters.

Where the election of a mayor was by charter to be as follows, :. : "That the mayor, aldermen, and burgesses, or the greater rt of them, should from time to time have a power of assembling emselves, or the greater part of them, at —— and should there atinue till they or the greater part of them then there assembled ould choose one of the aldermen to be mayor." *Held*, on idence of usage, that an election of a mayor by a majority of the ctors assembled was good : *R.* v. *Varlo* (1775), 1 Cowp. 248.

Where by charter Edward IV granted to the corporation of e city of London certain offices, some of which were to be ercised within the city, and others within the city and the erties thereof, including in the former class the office of gauger, rd Ellenborough, C.J., held on the evidence of continuous usage d the form of the Lord Mayor's oath that the corporation could ercise the office of gauger not only in the city but also within the erties thereof : holding that "city" could receive a wider erpretation than "within the walls" : *Mayor, etc., of London Long* (1807), 1 Camp. 22; 10 R. R. 618.

Miscellaneous.

A deed of trust of a rectory, which gave the right of election of curate to the parishioners and inhabitants : *Att.-Gen.* v. *Parker* 747), 3 Atk. 576; and an ambiguous inclosure award : *Wadley* v. *yliss* (1814), 5 Taunt. 752; 15 R. R. 645; and a grant of tithes m the Crown : *Lucton School* v. *Scarlett* (1828), 2 Y. & J. 330, 3, 365, have all been explained by evidence of usage.

In *Gape* v. *Handley* (1777), 3 T. R. 288, n., the question whether e presentation to a rectory belonged to the mayor and alder-n, or to the mayor, aldermen and burgesses; in *Blankley* v. *nstanley* (1789), 3 T. R. 279; 1 R. R. 704, the limits of the isdiction of magistrates; and in *Bradley* v. *Pilots of Newcastle-Tyne* (1853), 2 El. & Bl. 427, the persons liable to pay *primage*, re determined by evidence of usage. *R.* v. *Bellringer* (1792), 4 R. 810; *R.* v. *Osbourne* (1803), 4 East, 327; *Bailiffs, etc., of vkesbury* v. *Bricknell* (1809), 2 Taunt. 120; 11 R. R. 537; *R.* v. *yor of Chester* (1813), 1 M. & S. 101; *R.* v. *Davie* (1837), 6 Ad. El. 374; 45 R. R. 494, are to the same effect, and the point is ntioned in Grant on Corporations, p. 27.

Where some persons have interests adverse to usage.

As already stated, the force of usage as evidence of interpreta- n is much increased when it has been the interest of some of the ties to dispute the correctness of the established interpretation. appears to me," says Lord Cranworth, "that there are the st satisfactory circumstances tending to show what the rights of parties are : there are, long enjoyment, the same dealing with property for a very great period, during the whole of which it

was for the interest of one party to resist that which, neverthele he from time to time performed" : *Sadlier* v. *Biggs* (1853), H. L. C. 435, at p. 455; 94 R. R. 172.

Result of contradicting express words.

If evidence of usage were admissible for the purpose of affix to the words in the document a meaning that they do not prope bear, the absurd result would be arrived at that the interpretat placed on the same document might vary from time to time, that a person who acted under a mistake as to his rights by vir of an instrument would be for ever bound to act in the sa manner : *Moore* v. *Foley* (1801), 6 Ves. 232, at p. 238; 5 R. 270; *Iggulden* v. *May* (1807), 2 Bos. & Pul. N. R. 449; 8 R. 623; Sugden, V. & P. 169.

Ancient statutes.

Ancient statutes can also be interpreted by usage : *R.* v. *S* (1790), 3 T. R. 602; *Dunbar* (*Corporation of*) v. *Roxburg* (*Duchess of*) (1835), 3 Cl. & F. 335; *R.* v. *Archbishop of Cant bury* (1848), 11 Q. B. 483, at p. 581; 17 L. J. Q. B. 252; 75 R. 458; *Sharpley* v. *Overseers of Mablethorpe* (1854), 3 El. & 906; 24 L. J. M. C. 35; 97 R. R. 824; *Esdaile* v. *Assessm Committee of City of London Union* (1887), 19 Q. B. D. 431, p. 437; 56 L. J. M. C. 149. But if the words of the statute clear, an interpretation which contradicts them cannot be support on the ground of usage : *Sheppard* v. *Gosnold* (1671), Vaugh. 1 at p. 170; *Dunbar* (*Corporation of*) v. *Roxburghe* (*Duchess* (*supra*); *R.* v. *Archbishop of Canterbury* (*supra*), at p. 58 *Att.-Gen.* v. *Rochester* (*Corporation of*) (1854), 5 De G. M. & 797, *per* Turner, L.J., at p. 822; 104 R. R. 287; *Att.-Gen.* *Sidney Sussex College* (1869), 4 Ch. App., at p. 732; 38 L. J. 656; *Hamilton* v. *Baker* (1889), 14 App. Cas. 209, *per* L Macnaghten, at p. 222; 58 L. J. P. 57.

When a deed is ancient.

The question when a deed becomes ancient was discussed *North Eastern Ry. Co.* v. *Hastings*, [1900] A. C. 260; 69 L. J. 516, a case on a lease dated in 1854; and in that case Lord Da said : "I have formed my opinion on what is to be found wit the four corners of the instrument to be construed with adverting to the fact that the actings of the parties for forty-th years before the commencement of the action have been inc sistent with the views taken by your Lordships. I do not th that I could properly advise your Lordships to hold that actings of the parties during that period, which does not exc the limits of living memory, is evidence, upon which you act without other grounds for doing so, of a lost agreement vary that of 1854, or, which is the same thing in another form, ad the construction acted on by the parties as '*contemporan expositio*.' To do so would be inconsistent with what was said Lord Blackburn and Lord Watson in this House in *Clyde Trust*

Laird (1883), 8 A. C. 658, speaking in 1883 of an Act passed in 58, and so far as I know would be unsupported by any thority" : *ibid.*, at pp. 268, 269.

Modern statutes.

Evidence of usage is not admissible to interpret words in a odern statute. "The rule is correctly stated . . . that with gard to modern statutes the doctrine of *contemporanea expositio* of no value; and in my opinion evidence is not admissible as to e meaning of ordinary English words in a public Act of Parliaent; we are not dealing with any private statutes nor with ntracts. It is a public Act of Parliament, and the Court must ke judicial cognisance of the language used without evidence" : r Swinfen Eady, L.J., *Camden* (*Marquis*) v. *Inland Revenue mmissioners*, [1914] 1 K. B. 641, at p. 650; 83 L. J. K. B. 509.

"I have only to add that, in my opinion, such usage as has this case been termed '*contemporanea expositio*,' is of no value atever in construing a British statute of the year 1858. When ere are ambiguous expressions in an Act passed one or two nturies ago, it may be legitimate to refer to the construction put on these expressions throughout a long course of years by the animous consent of all parties interested as evidencing what ust presumably have been the intention of the Legislature at that note period. But I feel bound to construe a recent statute cording to its own terms when these are brought into controversy d not according to the views which interested parties may have herto taken : and in determining the true import of such a tute it appears to me to be quite immaterial to consider whether was passed in the year 1858 or 1883" : *per* Lord Watson, *ustees of Clyde Navigation* v. *Laird* (1883), 8 A. C. 658, at 673; approved *Goldsmiths' Co.* v. *Wyatt*, [1907] 1 K. B. 95, p. 107; 76 L. J. K. B. 166.

"But we are asked to say that the Court ought to take evidence to whether in dealing with this particular property there is e special and peculiar accepted meaning of these words minal rent.' No case has been called to our attention, and I not believe there is any case in which, dealing with a modern ute, any such evidence has ever been admitted" : *per* Cozensdy, M.R., in *Camden* (*Marquis*) v. *Inland Revenue Commisers*, [1914] 1 K. B. 641, at p. 647; 83 L. J. K. B. 509.

CHAPTER X.

TIME—DATE—PARTIES.

Chronology: Calendar: Feast Days are New Style: Year: Le Year: Quarter: Per Annum: Month: Day: Day is Indivisib Except where necessary to distinguish Acts done on same Da "From" a Day, Day is Excluded: Commencement "o a Day, Day is Included: "From" an Event, Day on wh event happens is Included: "Till" and "Until" Ambiguous: "To" and "From" with regard to place: D takes Effect from Delivery: Evidence admissible to pr Date: Construction of Reference to Date: Parties: Baptis Names: Reputed Wife: Divorced Woman: Incorrect Nam Firms: Class: Corporation: False Addition.

Having thus far discussed the general rules applicable to construction of deeds, it is proposed to consider the various clau in deeds in the order in which they usually occur, and since m deeds commence with the date and parties, those are the f clauses to be discussed.

But before discussing the cases relating to the dates of dee it is convenient to consider the question of time generally.

Chronology.

The dating of mediæval documents is sometimes a source confusion: there are two main causes of error.

Commencement of era.

First, a discrepancy as to the commencement of the Christ era, which is now reckoned to have begun on January 1, A.D. but which, according to Dionysius, began on what is now cal March 25, 1 B.C., and according to others, began on what is n called March 25, A.D. 1.

Secondly, a discrepancy as to the day and month in which year begins.

Commencement of year.

In England, Christmas Day was regarded as the first day of year, at any rate from the seventh century until the twe century, when March 25 began to supersede Christmas Day, by the end of the thirteenth century had superseded it, and c tinued to be the official first day of the year until 1752, when first day of the year was changed to January 1, by the statute Geo. 2 (1751), c. 23, which made the year 1751, which began

ırch 25, to end on December 31, and the year 1752 and all ɔsequent years to begin on January 1. This statute merely ve official recognition to what had for a long time been the pular practice, and it is probable that many legal documents re before 1752 dated as though the year began on January 1.

Julian calendar.

The civil calendar of all European countries, and of all countries e civilisation of which is European in its origin, has been adopted ɔm the Roman calendar, which was established on a scientific sis in the dictatorship of Julius Caesar, and is called the "Julian lendar." It came into force on January 1 in the year 45 B.C. was based on the assumption that the length of the solar year exactly 365¼ days, and accordingly three out of every four years nsisted of 365 days and the fourth year of 366 days, an inter-lary day being added in February. But as the length of the ar is really somewhat less than 365¼ days, there arose, in course time, a considerable divergence between the dates upon which ch natural events as the equinoxes and solstices occurred, and e dates on which they had occurred when the calendar came o force. Thus the vernal equinox, which had, when the Julian lendar was made, occurred on March 25, had at the time of e Council of Nice (A.D. 325) retrograded to March 21, and in 82 to March 11.

Gregorian calendar.

In the latter year, under the auspices of Pope Gregory XIII., e calendar was reformed for two purposes. First, in order to tore the nominal dates of the natural events of the year to the tes on which they had occurred at the time of the Council of ce (*e.g.*, the vernal equinox from March 11 to March 21), the ten ys between October 4 and October 15 were omitted from the endar for one year; that is to say, the natural day following tober 4 was called October 15, and that year consisted of 355 ys only. Secondly, in order to prevent a similar divergence in future, the number of intercalary days in 400 years was reduced three by treating a centenary year which, according to the ian calendar, would have been a bissextile or leap year, as a mon year of 365 days, unless its number was exactly divisible 400. Thus, according to both the Julian and Gregorian endars, the year 1600 was a bissextile year, but the years 1700, 0, and 1900, which, according to the Julian calendar would have n bissextile, were, according to the Gregorian calendar, not extile.

Introduced into England.

The Gregorian calendar was promulgated by brief of gory XIII. in March, 1582, and adopted in the same year by ıy European countries, but was introduced into the British ninions of George II. by the above-mentioned statute, 24 Geo. 2 51), c. 23, when the necessary correction in the calendar was

made by omitting from the calendar for 1752 the eleven da between September 2 and September 14, and the Gregorian arrang ment of intercalary days was adopted. Some official anomali are explainable by reference to the unreformed calendar; th April 5, which is the day before Old Lady Day and the last d of the old official year, is still the day to which dividends Government stocks are calculated.

Tables of the dates of the years of the Sovereigns of Englan methods of determining the dates of the beginnings and ends the law terms before 1752, and the dates of the beginnings a ends of the terms from 1752 to 1830 inclusive, are to be found Sweet's Jarman and Bythewood, vol. 1, pp. 188 *et seq.* (3rd ed.)

Feast days are feast days according to Gregorian calendar, in deeds.

Since the reformation of the calendar, Michae mas and Martinmas (and on the same principle t other feast days) mean in deeds Michaelmas a Martinmas according to the new style, unless contrary meaning can be derived from the contex and evidence is not admissible to prove the contrar

A tenant, after holding for a few years on a parol agreeme from Old Michaelmas, took a lease to hold from the feast St. Michael. After the expiration of the lease he held over. Noti to quit was given for Old Michaelmas, but it was held bad, a no evidence was admissible to show that in the lease the feast St. Michael meant Old Michaelmas, unless there had been in t lease a reference to the prior holding (which there was not) : *D* v. *Lea* (1809), 11 East, 312.

In a pleading Martinmas means November 11, and n November 23 (Old Martinmas), and no extrinsic evidence ought be received to explain the record : *Smith* v. *Walton* (1832), 8 Bin 235; 1 Moore & S. 380; 1 L. J. C. P. 85.

In parol lettings custom admissible.

But if there be a parol letting, evidence of the custom of t country that Michaelmas means Old Michaelmas, or Lady Da Old Lady Day, is admissible.

In ejectment, the custom of the country that all holdings fr Michaelmas meant from Old Michaelmas being admitted, *Held* th a notice to quit at Michaelmas must be regarded as notice to q at Old Michaelmas, and therefore regular : *Furley* v. *Wood* (179 1 Esp. 198.

Where there was a letting by parol from Lady Day, it was h that evidence of the custom of the country was admissible t Lady Day meant Old Lady Day : *Doe* v. *Benson* (1821), 4 B. Ald. 588.

A year usually means a period of twelve calendar months, calculated either from January 1 or from any other named day, and consisting of 365 days in common years and of 366 days in leap years.

Meaning of year.

"The space of a year is a determinate and well-known period, ısisting commonly of 365 days; for though in bissextile or leap ırs it consists properly of 366, yet by the statute 21 Hen. 3 36) the increasing day in the leap year, together with the pre- ing day, shall be accounted for one day only": Blackst. Com. . II (8th ed., p. 140). The statute (which is in Ruffhead's tion 21 Hen. 3, and in the Statutes of the Realm 40 Hen. 3 55)) related to essoins only, and was repealed by 42 & 43 Vict. 59 (The Civil Procedure Acts Repeal Act, 1879).

Leap year.

A hiring on October 13, 1807, to serve till October 11 following, d not a service for a year, although the year 1808 was a leap ır. "In those years which consist of 366 days a hiring and vice for a year must be for that same number of days: in like nner as when the year has 365 days it must have continuance ing that number": *per* Lord Ellenborough, C.J. "One day s wanting to complete the year, for in leap year the statute cts that the year shall consist of 366 days": *per* Bayley, J. he statute for regulating the bissextile year ordains that in leap r the intercalary day with the day preceding it shall be ounted as one day": *per* Holroyd, J., *R.* v. *Inhabitants of rminghall* (1817), 6 M. & S. 350.

Quarter.

Condition for re-entry on non-payment of rent at Michaelmas or the space of a quarter of a year after. *Held*, that 91 days made uarter, the law paying no regard to the six hours over, "and e that every quarter of a year contains in it 91 days, which ke 13 weeks, and half a year contains 182 days, but the year days": *Anon.* (1575), 3 Dyer, 345 a, pl. 5.

From feast to feast.

But in some cases a year has been held to mean a period less ı 365 days. Thus, a hiring from Whitsuntide to Whitsuntide hiring for a year though there be in fact less than 365 days veen the two feasts: *R.* v. *Inhabitants of Newstead* (1769), r. S. C. 669; *Grant* v. *Maddox* (1846), 15 M. & W. 737; 16 J. Ex. 227; 71 R. R. 815 (agreement to perform in a theatre three years, "year" meant the season in which the theatre open). Cf. *R.* v. *Standon Massey* (*Inhabitants*) (1809), 10 , 576.

Yearly offices.

A municipal charter provided that the capital burgesses and mon council should nominate and elect on the Monday before ıaelmas a person to be mayor for one whole year thence next ing, and that he should take certain oaths before executing the

office on the Friday after Michaelmas. None who had once bor the office of mayor should be again elected within the space three years next ensuing the end of his office of mayoralty. *He* that three years meant years of office, and not calendar years, a therefore a person who had served as mayor might be promoted the same office as soon as three mayoralties had intervened; al that a person became mayor when he was sworn in, not when was elected: *R.* v. *Swyer* (1830), 10 B. & C. 486.

"Per annum."

In cases to which the Apportionment Act does not apply, if payment of a certain sum is to be made "in each year" or "p annum," the sum is not apportionable, and is only payable respect of a completed year, but if the payment is "at the rate so much a year," the sum is apportionable and payable in respect incomplete years.

Articles of association provided that "the board shall entitled to receive by way of remuneration in each year £5,000 *Held* that remuneration could only be claimed for a complete yea "Art. 81 does not give remuneration at the rate of £5,000 a yea but only provides that the board shall be entitled to receive by wa of remuneration in each year £5,000": *per* Cozens-Hardy, J *Salton* v. *New Beeston Cycle Co.*, [1899] 1 Ch. 775, at p. 77 68 L. J. Ch. 370.

Articles of association provided that "the directors shall paid out of the funds of the company . . . a sum of £100 p annum to each director" as remuneration. *Held* that that su was not apportionable and the directors were not entitled to a remuneration for the seven months preceding the liquidation. " . . . the words had been at the rate of £ . . . , I suppose there ca be no question that the sums would be apportionable": *p* Wright, J., *Re Central de Kaap Gold Mines* (1899), 69 L. J. Ch.1 "as a matter of practice the question of apportionment is no usually avoided or dealt with by using the words 'at the rate o in the articles": *per* Scrutton, L.J., *Moriarty* v. *Regent's Gara Co.*, [1921] 2 K. B. 766, at p. 779; 90 L. J. K. B. 783.

New Law.

"Term of years."

As to what is included in the expression "term of years," s section 205 (xxvii) of the Law of Property Act, 1925.

"In each year."

Where something is to be done in each yea year means a calendar year from January 1 t December 31.

Under section 26 of the Companies Act, 1862 (now repealed) was provided that a list of shareholders shall be made "once least in every year," and under section 49 that a general meetin shall be held "once at least in every year." *Held* that year mea calendar year from January 1 to December 31, and not a peri

ckoned from incorporation to the anniversary of incorporation : bson v. *Barton* (1875), L. R. 10 Q. B. 329; 44 L. J. M. C. 81.

Meaning of month.

Month, unless the context or other admissible evidence shows the contrary, means lunar month in all documents except (i) ecclesiastical documents; (ii) mercantile documents (*quaere* in the City of London only: *per* Farwell, J., *Bruner* v. *Moore*, [1904] 1 Ch. 305; 73 L. J. Ch. 377; see *infra*, p. 173); (iii) mortgage transactions; (iv) statutes since 1850 (13 & 14 Vict. (1850), c. 21, s. 4; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3); and (v) Rules and Orders of Court, etc. (R. S. C., Order LXIV, rule 1; County Court Rules, 1903, Order LV (*a*)); and lunar month is a period of twenty-eight days.

New Law.

But as to instruments made or coming into operation after 1925, "month" means calendar month, unless the context otherwise requires: section 61 of the Law of Property Act, 1925.

"A month, *mensis*, is regularly accounted in law twenty-eight yes, and not according to the solar month nor according to the endar, unlesse it be for the account of the laps in a *quare pedit*": Co. Litt. 135 b.

The Magna Carta provides that the County Court shall be den *de mense in mensem*, "and there is to be accounted twenty-ht dayes to the legall month in this case, and not according to month of the kalender": Co. 2 Inst. 71, n. 2.

By 27 Hen. 8 (1535), c. 16 (*b*), bargains and sales of land e required to be enrolled within six months after the date reof. "The six moneths shall be accounted after the computa- of twenty-eight dayes to the moneth": Co. 2 Inst. 674, n. 10; *mas* v. *Popham* (1562), 2 Dyer, 218 b.

By 31 Eliz. (1588) c. 7, a penalty of 10s. was imposed for every th that an offence continued. "This moneth is to be accounted rding to the computation of twenty-eight daies": Co. 2 Inst. , n. 4.

"The space of a month is more ambiguous": (*sc.* than that year) "there being in common use two ways of calculating

(a) But *held*, upon the construction of a registrar's minute of the order upon dgment summons, "month" meant a lunar month: *Saunders* v. *Swansea nce Co.* (1905), 21 T. L. R. 317.

(b) Repealed by the Law of Property (Amendment) Act, 1924.

months; either as lunar, consisting of twenty-eight days, th supposed revolution of the moon, thirteen of which make a year or as calendar months of unequal lengths according to the Julia division in our common almanacs commencing at the calends c each month whereof in a year there are only twelve. A month i law is a lunar month, or twenty-eight days, unless otherwis expressed; not only because it is always an uniform period, bu because it falls naturally into a quarterly division by weeks Therefore, a lease for 'twelve months' is only for forty-eigh weeks, but if it be for 'a twelvemonth,' in the singular numbe it is good for the whole year": Blackst. Com. Bk. II, (8th ed p. 141). See the comments of Atkin, L.J., on this proposition i *Phipps & Co.* v. *Rogers*, [1925] 1 K. B. 14, at p. 26; 93 L. J. K. B 1009. In *Rogers* v. *Kingston-on-Hull Dock Co.* (1864), 11 L. T. 42 it was held (*inter alia*) that the custom of a small estate was no sufficient to vary the *prima facie* meaning of "month" to "calenda month," though the custom of a district might be sufficient.

"A twelve-month."

In a contract at law month means a lunar month, unless ther is admissible evidence of an intention in the parties using the wor to denote a calendar month: Sug. V. & P. (14th ed.), p. 257.

Mortgage transactions.

"There is a rule whereby in mortgage transactions the wor 'month' is to be taken to mean calendar month": *pe* Pollock, M.R., *Schiller* v. *Petersen & Co.*, [1924] 1 Ch. 394, a p. 417; 93 L. J. Ch. 386.

Contracts relating to land.

It may be observed that even in a contract for or connecte with the sale of land the term month means *prima facie* a luna month, although it may be construed a calendar month if from th context or from the surrounding circumstances at the time c making the contract such appears to have been the intention of th parties: Dart, V. & P. c. 10, s. 1 (7th ed., p. 505); and to th same effect Woodfall, Landlord and Tenant, c. 6, s. 2 (21st ed p. 279).

Condition of re-entry in lease.

Where a condition of re-entry was on non-payment of the ren by the space of one month after each quarter, and the demand c the rent was the 28th day after Christmas. *Held*, it was good *Kirby* v. *Green* (1573), Lut. 1131, at p. 1139; 2 Nel. Lut. 461.

Submission to arbitration.

By deed of submission to arbitration an umpire's award was t be binding "so as it be made within six months next after the da of his appointment"; on August 16 the umpire was appointed an made his award on February 12, 1817. *Held* that months mea lunar months and that the award was bad: *Re Swinford and Ho* (1817), 6 M. & S. 226.

Auctioneer.

The defendants employed the plaintiff, who was an auctionee to sell land upon certain terms as to commission, "half per cent. not sold at auction or within two months after." The auction w

d on August 6, 1845, and on October 2 the lands were sold private contract. *Held*, that months meant lunar months. "It is also clear that 'months' denote at law 'lunar months,' less there is admissible evidence of an intention in the parties ng the word to denote 'calendar months'": *per* Denman, C.J., *npson* v. *Margitson* (1847), 11 Q. B. 23, at p. 31; 17 L. J. Q. B. ; 75 R. R. 278.

Engraver.

The defendant agreed to engrave a picture "in twenty-one nths from the date of the receipt of the picture, having the ginal picture in my possession at intervals as may be agreed ween ourselves for fourteen months." Month in this contract ans lunar month. "The law, in all cases not mercantile trans-ions in the city of London, as to the meaning of the word month, ant lunar month. In all mercantile transactions in the city of ndon a month means calendar month. But that is not the case re. The defendant is not a mercantile man, and I shall hold that this contract month means lunar month, unless there is some idence to show that calendar month was meant": *per* Erle, C.J., *rner* v. *Barlow* (1863), 3 F. & F. 946, at p. 949; 130 R. R. 938.

Hiring furniture.

in an agreement for hiring furniture, month was held to be lunar nth, where the context militated against the construction of nths as "calendar months" and the contract was held to be a e transaction and not a mortgage: *Hutton* v. *Brown* (1881), L. T. 343.

Option to purchase patents.

By an agreement, dated September 29, 1902, the defendant nted to the plaintiff the exclusive option to purchase "during period of six months" from the date thereof certain letters ent. The plaintiff and defendant were both aliens residing porarily in London. In an action for specific performance it s held that months meant lunar months: *Bruner* v. *Moore*, 04] 1 Ch. 305; 73 L. J. Ch. 377.

Statutes prior to 1850.

To the above examples may be added the following cases on tutes prior to 1850, in each of which month was held to be ar month: *Dormer* v. *Smith* (1601), Cro. Eliz. 835; *Wethered's e* (1613), 2 Roll. Ab. 521 c, pl. 3; *Brown* v. *Spence* (1663), ev. 101; *R.* v. *Peckham* (1697), Comb. 439; *Lacon* v. *Hooper* 95), 6 T. R. 224; *Hurd* v. *Leach* (1804), 5 Esp. 168; *Crooke* v. *Tavish* (1823), 1 Bing. 307.

Old law proceedings.

In old law proceedings month meant lunar month: *Tullet* v. *field* (1764), 3 Burr. 1455. "In legal proceedings the months n lunar months unless the contrary appear to be the meaning n the subject-matter to which that term is applied": *per* ley, J., *Johnstone* v. *Hudleston* (1825), 4 B. & C. 922, at p. 932; . J. (o.s.) K. B. 71; 28 R. R. 505. But the time allowed for emption in a foreclosure decree is to be calculated according to

Foreclosure decrees.

calendar and not lunar months : *Anon.* (1740), Barnard, Ch. Rep 324; 2 Eq. Ca. Abr. 605, pl. 38; and see *per* Fry, J., in *Hutton* v *Brown* (*supra*).

Context.

The context may show that month means calendar month.

Agreement for sale.

Thus where a sale was made on January 24, abstract to b delivered in a fortnight and to be returned at the end of tw months, draft to be delivered in three months and to be returne in four months, final payment to be made on June 24 followin (which made five calendar months from the sale), it was held tha months meant calendar months : *Lang* v. *Gale* (1813), 1 M. & S 111; 149 R. R. 817.

Tenancy agreements.

The defendant became tenant of the premises on October 29 1810, under an agreement by which he was always to be subjec to quit at three months' notice, it was *held* by Lord Ellenboroug that this was a holding from three months to three months, an therefore calendar months were intended : *Kemp* v. *Derrett* (1814 3 Camp. 510; 14 R. R. 828. Cf. *Soames* v. *Nicholson*, [1902 1 K. B. 157; 71 L. J. K. B. 24.

A tenancy agreement dated December, 1829, was "for the ter of six months from the 1st of January next, and so on from si months to six months until one of the said parties shall give to th other of them six calendar months' notice in writing to determin the tenancy, at and under the rent of £13 for every six month the first payment to be made on the 1st day of July, 1830." *Hel* month meant calendar month : *R.* v. *Chawton* (1841), 1 Q. B. 247 10 L. J. M. C. 55; 55 R. R. 246. See also *Helsham-Jones* v *Hennen* (1914), 84 L. J. Ch. 569; *Orton* v. *Bristow* (1916), 3 T. L. R. 129, 352.

In *Phipps & Co.* v. *Rogers*, [1925] 1 K. B. 14; 93 L. J. K. B 1009, the Court of Appeal, reversing Lush, J., held that th relationship of landlord and tenant was never held to come withi the statutory exceptions and that apart from evidence of a contrar intention, the expression "three months" in a tenancy agreeme meant three lunar months.

Ecclesiastical affairs.

The following are cases relating to ecclesiastical affairs in whic month has been held to mean calendar month : Co. 2 Inst. 36 n. 23; 2 Bl. Com. 276 (*c*); *Catesby's Case* (1607), 6 Rep. 61 b Cro. Jac. 166; Yelv. 100; Jenk. Cent. 282; *Copley* v. *Colli* (1616), Hob. 179; *Doctor Clea and his Chaplain* (1626), Litt. Re 19; *Sharp* v. *Hubbard* (1675), 2 Mod. 58; *Burton* v. *Woodwa* (1692), 4 Mod. 95; 1 Show. K. B. 368; Comb. 191; Skinner, 31 and *per* Knight Bruce, V.-C., *Bluck* v. *Rackham* (1846), 5 Mo P. C. C. 305, at p. 308. The *Case of Albany and Bishop* S. *Asaph* (1585), 1 Leon. 31, seems to be *contra*.

(*c*) Original pagination.

In mercantile documents month means calendar month. Mercantile documents.
In the older cases the Judges seem to have held that even in rcantile documents month meant lunar month.

Defendant covenanted, upon payment of £500 within one month xt following, to transfer certain shares. Plaintiff tendered £500 er twenty-eight days but within a calendar month. *Held*, month ant lunar month : *Barksdale* v. *Morgan* (1693), 4 Mod. 185; *celyn* v. *Hawkins* (1720), 1 Stra. 446. But this is not now the v.

In debt on a bond it was pleaded that the money was lent from gust 24 to May 24, and proved that it was lent for nine months. was objected that this was a variance, for months must be lunar; t the Chief Baron (Gilbert) thought it well enough, the general derstanding being of calendar months in cases of this nature : *tus* v. *The Lady Preston* (1726), 1 Stra. 652. See also *Cockell Gray* (1822), 6 J. B. Moore, 483. Bond.

Lord Kenyon left it to the jury to say whether a month in a arter-party meant a lunar or a calendar month; the jury said it s a calendar month : *Jolly* v. *Young* (1794), 1 Esp. 185. Charter-party.

Wines were sold "at twelve months' credit" and spirits "at ur months' credit." "In commercial matters 'a month' always eans a calendar month. In bills of exchange, promissory notes, voices, times of credit, and everything else relating to com- ercial matters, it is so, and I know of no instance to the ntrary" : *per* Pollock, C.B., *Hart* v. *Middleton* (1845), 2 Car. & r. 9, at p. 10. Sale of wine

But in *Bruner* v. *Moore*, [1904] 1 Ch. 305, at p. 311; 73 L. J. . 377, it was said by Farwell, J., that the exception does not ply to all mercantile documents. "If any such exception be up it must be proved in each case (unless judicially recognised) a customary usage in the particular trade or place." The ception is judicially recognised as to mercantile transactions in city of London : *per* Erle, C.J., *Turner* v. *Barlow* (1863), F. & F. 946, at p. 949; 130 R. R. 938. The *dictum* of Little- e, J., in *R.* v. *Inhabitants of Chawton* (1841), 1 Q. B. 247; L. J. M. C. 55; 55 R. R. 246, was not meant to go further : *per* rwell, J., *Bruner* v. *Moore* (*supra*). Quaere in London only.

Month was also held to mean calendar month in certain cases on tutes prior to 1850, *viz.* : *Wright* v. *Wheatley*, Noy, 37; *R.* v. *ssens* (1664), 1 Sid. 186; *Devereux* v. *Bradstreet* (1784), Wallis, ; *Biddulph* v. *St. John* (1805), 2 Sch. & Lef. 521. Statutes prior to 1850.

A calendar month ends upon the day in the next ensuing month ving the same number as that on which the computation began, if the next ensuing month has no day which has the same nber as that on which the computation began, then the calendar When month ends.

month ends on the last day of the next ensuing month, and whe day is treated as a period of twenty-four hours at the same hour that on which the computation began : *Freeman* v. *Read* (1863 4 B. & S. 174; 32 L. J. M. C. 226; 129 R. R. 705; *Migotti* *Colville* (1879), 4 C. P. D. 233; 48 L. J. C. P. 695.

Meaning of day.

A day is a period of twenty-four hours and eac calendar day commences at midnight, the instant c midnight being common to both the preceding an succeeding day.

"Now divers nations begin the day at divers times . . . th Aegyptians and Romanes from midnight : and so doth the law i England in many cases" : Co. Litt. 135 a; 2 Bl. Com. 141.

Day is indivisible.

Although a day consists of a period of twenty four hours, a day is, except in cases where i is necessary to distinguish acts done, or event happening, on the same day, considered at law a an indivisible period or *punctum temporis*.

Fractions of a day.

"For regularly the law maketh no fraction of a day" : Co. Inst. 53.

"In the space of a day all the twenty-four hours are usuall reckoned; the law generally rejecting all fractions of a day in orde to avoid disputes. Therefore, if I am bound to pay money on an certain day, I discharge the obligation if I pay it before twelv o'clock at night, after which the following day commences" : B Com. Bk. II (8th ed., p. 141).

Age.

In reckoning a man's age, if one be born on February 15 h will be of full age on February 14 : *Herbert* v. *Torball* (1663 1 Sid. 162; 1 Keb. 589. See also *Toder* v. *Sansam* (1775), 1 Br P. C. 468, 475, and *Re Shurey; Savory* v. *Shurey*, [1918] 1 Ch 263; 87 L. J. Ch. 245, where Sargant, J., [1918] 1 Ch., at p. 26 says : "I must declare that Captain Shurey attained the age c twenty-five years on the day preceding the twenty-fifth anniversar of his birth."

In *Letterstedt* v. *Broers* (1884), 9 A. C. 371, at p. 37 53 L. J. P. C. 44, where nothing turned upon the distinctio between the days, Lord Blackburn's statement that the appellar "was born on the 13th May, 1853, and consequently attained th age of twenty-one on the 13th May, 1874," was apparently n intended in the strict legal sense.

If one be born February 1 at 11 p.m. and live till January 3 in the twenty-first year, and make a will of lands at 1 a.m. an

, it is a good will, for he was then of age : *Anon.* (1704), 1 Salk. ; *S. C. sub nom. Fitzhugh* v. *Dennington*, 2 Ld. Raym. 1094.

Service.

If a man enters on a service on October 11 in the afternoon d serves till (including part of) October 10 following, he has ved a year, for there are no fractions of a day : *R.* v. *Inhabitants Syderstone* (1777), Cald. 19.

Tenancy.

C entered into possession of premises about noon, September 30, 50, and signed an agreement : "the tenancy is for one year, mmencing on the 30th September *inst.*" He gave up possession September 29, 1851, about 4 p.m., to an incoming tenant by angement. *Held*, that C had occupied for a whole year : *R.* v. *Mary, Warwick* (1853), 1 El. & Bl. 816; 22 L. J. M. C. 109; R. R. 414.

Ships.

Where a ship was detained by the charterers for one day and a lf beyond the lay days allowed for discharge, it was held that the arterers were liable to pay the shipowners demurrage for two ole days : *Commercial S.S. Co.* v. *Boulton* (1875), L. R. 10 Q. B. 3; 33 L. T. 707; 44 L. J. Q. B. 219.

And where the charterers of a ship on time charter detained the p for a few hours beyond the expiration of the charter it was d that they were liable to pay to the shipowner extra hire money one whole day : *Angier Brothers* v. *Stewart Brothers* (1884), Cab. & Ell. 357.

A day upon which only half a day's work in discharging a ship s done was nevertheless held to have been a whole lay day : *e Katy*, [1895] P. 56; 64 L. J. P. 49; *Branckelow S.S. Co.* v. *mport and Holt*, [1897] 1 Q. B. 570; 66 L. J. Q. B. 382; *ncashire and Yorkshire Railway* v. *Swan*, [1916] 1 K. B. ; 85 L. J. K. B. 694 (upon the construction of a particular tract).

Where a charter-party provided that cargo should be discharged t the average rate of not less than 120 tons per weather working ," and a fraction of a day was required for completion of the charge, *held* the charterer was entitled to the whole of that : *Houlder* v. *Weir*, [1905] 2 K. B. 267; 74 L. J. K. B. 729.

Royal assent.

And on this principle the giving of the royal assent to an Act of liament has been referred to the first instant of the day on ch it was given : *Tomlinson* v. *Bullock* (1879), 4 Q. B. D. 230; L. J. M. C. 95.

Judicial acts.

It has been said that the Court will not inquire which of two cial acts done on the same day was done first, for all judicial are referred to the first instant of the day on which they e done; but in *Clarke* v. *Bradlaugh* (1881), 7 Q. B. D. 151; . B. D. 63; 50 L. J. Q. B. 678; 51 L. J. Q. B. 1, some doubt expressed as to the soundness of this doctrine.

But day may be treated as divisible.

"But though the law does not in general allo of the fraction of a day, yet it admits it in case where it is necessary to distinguish": *per* Lor Mansfield, *Combe* v. *Pitt* (1763), 3 Burr. 1423, a p. 1434.

Action.

Error was brought to reverse a judgment for slander on th ground that the plaint was entered the same day as the word spoken, but the action should be brought after the words, whic could not be, for there are no fractions of a day, but Rolle, J said it was well enough: *Symons* v. *Low* (1647), Styl. 72.

A declaration entitled generally of Michaelmas term is referre to the first day of term; the declaration laid the promise an breach on the first day of term. The defendant demurred on th ground that the declaration must be referred to the first instant the day, and therefore was before the breach, but *held* that th declaration must be referred to the sitting of the Court on that day and therefore there was time for the promise and breach to preced the declaration. Declaration is an act of the party and not judicial act: *Pugh* v. *Robinson* (1786), 1 T. R. 116.

Title.

The lessor's ancestor died January 1, 1771, at 5 a.m. Th demise was laid in the declaration on the same January habendum from December 31 then last past. A motion to s aside the verdict on the ground that, as the ancestor was living January 1 and there is no fraction of a day in fiction of law, was alive all that day, and title did not accrue to the lessor of th plaintiff until the beginning of the next day, was dismissed: *R* v. *Hersey* (1771), 3 Wils. 274.

On the same day as, but after, the sheriff had completed the sa of goods seized under a *fi. fa.*, and before he had paid the proceed to the judgment creditor, a writ of extent against the goods of th same debtors tested that day was delivered to him. *Held*, th extent did not overreach the judgment creditor's right to th proceeds of sale: *Swain* v. *Morland* (1819), 3 J. B. Moore, 74 1 Brod. & Bing. 370; 22 R. R. 651.

Bankruptcy.

Where the validity of an execution depends on its priority relation to an act of bankruptcy and both occurred on the sam day, it is open to inquire which occurred first: *Sadler* v. *Leig* (1815), 4 Camp. 195.

A debtor's goods were seized by the sheriff before 2 p.m. Aft 6 p.m. on the same day the debtor surrendered in discharge of ba and lay in prison two months, whereby he became bankrupt. Th plaintiffs were his assignees in bankruptcy and sued the sheriff f the goods so seized on the ground that in law the goods must assumed to have been vested in them during the whole of the da

surrender. *Held*, that the interests of third parties being cerned the day might be divided into fractions: *Thomas* v. *sanges* (1819), 2 B. & Ald. 586.

"The good sense of the matter is that where it is necessary to w which was the first of two acts, the Court is at liberty to sider fractions of a day": *per* Patteson, J., *Chick* v. *Smith* 40), 8 Dowl. 337, at p. 340; 59 R. R. 829.

Dog licences.

By section 5 of 30 Vict. (1867), c. 5, a licence to keep a dog hall commence on the day on which the same shall be granted." *ld*, that a man who took out a licence at 1.10 p.m. on October 21 ld be convicted of the offence of keeping a dog without a licence October 21, it being proved that he kept the dog at 12.40 p.m. that day: *Campbell* v. *Strangeways* (1877), 3 C. P. D. 105; L. J. M. C. 6. "The law will distinguish the fractions of a day, ., where it is necessary . . . for the purposes of the decision to w which of two events first happened": *per* Grove, J., *ibid.* p. 107.

Issue of writ.

A writ was issued on the same day on which, but after, the se of action arose. *Held*, on demurrer, that the Court could e cognisance of the fact that the writ did not issue till after cause of action accrued, notwithstanding the legal doctrine that udicial act is referred back to the first moment of the day on ch it is done: *Clarke* v. *Bradlaugh* (1881), 7 Q. B. D. 151; 8 B. D. 63; 50 L. J. Q. B. 678; 51 L. J. Q. B. 1; by C. A. on the und that the issue of a writ in a civil action is the act of the ty.

In consequence of the rule that fractions of a day are not rded, and that a day is indivisible, it follows that—

Days mean calendar days.

> In computing the lapse of time by days, calendar days are meant, but the context or other admissible evidence may show that calendar days are not meant.

The following cases are instances of the rule: *R.* v. *Inhabitants yderstone* (1777), Cald. 19; *R.* v. *St. Mary, Warwick* (1853), . J. M. C. 109; 93 R. R. 414; *Commercial S.S. Co.* v. *Boulton* 5), L. R. 10 Q. B. 346; 33 L. T. 707; *The Katy*, [1895] P. 64 L. J. P. 49; *Branckelow S.S. Co.* v. *Lamport and Holt*, 7] 1 Q. B. 570; 66 L. J. Q. B. 382.

Unless otherwise agreed.

s regards the qualification, the parties may by express words that the days shall not be calendar days but periods of ty-four hours, commencing at any moment, *e.g.*, at noon: *er Bros.* v. *Stewart Bros.* (1884), 1 Cab. & Ell. 357; *Yeoman he King*, [1904] 2 K. B. 429; 73 L. J. K. B. 904; and,

Or by context.

inasmuch as in marine insurance policies a period of twenty-fo hours after arrival is covered by the policy, it has been held th days added to or substituted for such period of twenty-four hou are also periods of twenty-four hours after arrival: *Mercanti Marine Insurance Co.* v. *Titherington* (1864), 5 B. & S. 765; L. J. Q. B. 11; 136 R. R. 732; *Cornfoot* v. *Royal Exchange Assu ance Co.*, [1903] 2 K. B. 363; [1904] 1 K. B. 40; 73 L. K. B. 22.

Days are consecutive.

Further, in charter-parties and bills of lading, in the absen of context or usage to the contrary, days and running days mea consecutive days without the exception of Sundays, holidays, days on which, through stress of weather, work is impossible *Brown* v. *Johnson* (1842), Car. & M. 440, at pp. 444 and 448; R. R. 879; 10 M. & W. 331, at p. 334; *Nielsen* v. *Wait* (1885), Q. B. D. 67: *per* Lord Esher, M.R., at p. 72; 55 L. J. Q. B. 87.

Working days.

"Working days" mean days on which it is lawful or customa to work, and include such days, though work is prevented by stre of weather, and days on which work is actually done, though it not strictly lawful or customary to do work thereon: *Thiis* v. *Bye* (1876), 1 Q. B. D. 244; *Holman* v. *Peruvian Nitrate Co.* (1878 5 Sess. Cas. 4th Ser. 657; *Nielsen* v. *Wait* (1885), 16 Q. B. D. 67 *per* Lord Esher, M.R., at p. 71.

The contrary was held, by context, in *Commercial S.S. Co.* *Boulton* (1875), L. R. 10 Q. B. 346; 44 L. J. Q. B. 219; and b usage, in *Cochran* v. *Retburg* (1800), 3 Esp. 121; *Nielsen* v. *Wa* (1885), 16 Q. B. D. 67; 55 L. J. Q. B. 87.

From a date is exclusive of that date.

In computing a period of time from the dat or the day of the date, of a deed, or any fixed day— that day is *prima facie* to be excluded, but th context or other admissible evidence may show tha it is to be included.

Rule inflexible till 1777.

The old rule was that such day was excluded, and could not included: Co. Litt. 46 b; Co. 2 Inst. 674, note 10; *Thomas* *Popham* (1652), 2 Dyer, 218 b; *S. C. sub nom. Anon.*, Moore, 4 *Clayton's Case* (1585), 5 Rep. 1; *Barwick's Case* (1597), 5 Re 93 b, at p. 94 a, b; *S. C. sub nom. Berwick's Case*, Moore, 39 *Douglas* v. *Shank* (1600), Cro. Eliz. 766; *Butler* v. *Fincher* (1614 2 Buls. 302; *Seybrooke* v. *Ball* (1617), 1 Roll. Abr. 828, pl. *Scavage* v. *Parker* (1622), Cro. Jac. 647; *Bull* v. *Wyot* (1634 *Digby* v. *Jordan* (1635), 1 Roll. Abr. 828, pl. 1; *Cornish* v. *Caw* (1648), Aleyn, 77; *Watts* v. *Dix* (1649), Styl. 189 and 204; *Goo gaine* v. *Wakefeild* (1660), 1 Sidf. 7; *Evans* v. *Crocker* (1688 3 Mod. 198; *Sir R. Howard's Case* (1699), 2 Salk. 624; Ld. Ray

0; Holt, 195 ("from the day of the date thereof"); *Denn* v. *arnside* (1747), 1 Wils. 176; *Doe* v. *Watton* (1774), Cowp. 189; *atson* v. *Pears* (1809), 2 Camp. 294; 11 R. R. 712.

This rule was adhered to, as a strict and inflexible rule of con-uction, down to Lord Mansfield's judgment in *Pugh* v. *Duke of eds* (1777), Cowp. 714, and the Courts were forced to resort to rious devices to avoid the inconveniences and hardships which nsequently arose.

Devices to get over rule.

Thus, in cases of leases for lives executed on the day of the te, habendum from the day of the date, which were consequently d as creating freehold estates *in futuro*, if livery of seisin was ade after the date, it was held by some Judges that the leases re thereby made good, for the estate passed by the livery and t by the deed: 1 Roll. Abr. 828, pl. 4; *Mellow* v. *May* (1601), ore, 636; *Banks* v. *Brown* (1605), Moore, 759; *Smith* v. *Bole* 317), Cro. Jac. 458, and a similar device was resorted to in *eeman* d. *Vernon* v. *West* (1763), 2 Wils. 165 (*contra Hennings Pauchard* (1607), Cro. Jac. 153); and in some cases a distinction s drawn between "from the day of the date," which excluded h day, and "from the date," which was said to include such y. This distinction was probably based on the fact that the tin substantive "*datus*" etymologically means "the act of ing," and was so used in classical Latin, so that "*a datu*" might h considerable propriety be translated into English "from the ing," *i.e.*, the delivery of the deed. See *Rooke and Richard's e* (1633), Hale's MSS. fol. 6, cited note 8 to Butler and rgrave's Co. Litt. 46 b; *Osbourn* v. *Rider* (1605), Cro. Jac. 135; *on.* (1611), 1 Buls. 177, *per* Fleming, C.J.; *Hatter* v. *Ashe* 96), 3 Lev. 438; 1 Ld. Raym. 84; *S. C. sub nom. Haths* v. *Ash*, alk. 413. But this distinction was not recognised by Coke or all Judges: Co. Litt. 46 b; *Clayton's Case* (1585), 5 Rep. 1; *on* v. *Waller* (1616), 3 Buls. 203; 1 Roll. Rep. 387; and in dern English it is clear that "the day of the date" and "the e" mean the same thing: *Pugh* v. *Duke of Leeds* (1777), Cowp.

Rule now gives way to intention.

But since *Pugh* v. *Duke of Leeds* (1777), Cowp. 714, it cannot aid that the rule that from the day of the date excludes such is inflexible. In that case there was a power in a settlement to e leases in possession; the donee of the power made a lease ntended exercise of the power, habendum from the day of the of the lease. Lord Mansfield, on the principle *ut res magis at quam pereat*, held that the term commenced on the day of date.

Patents.

n *Russell* v. *Ledsam* (1845), 14 M. & W. 574; 14 L. J. Ex. 73 R. R. 244, it was held that the term of fourteen years

from the date thereof, for which a patent dated February 26, 182 had been granted, expired at midnight on February 25, 1839, o the ground that if there had been an imitation on the day of th grant it would have been an infringement, and the patent was onl for twenty-one years, not for twenty-one years and one day.

In *English* v. *Cliff*, [1914] 2 Ch. 376, at p. 383; 83 L. J. Ch 850, Warrington, J., said: "There is no absolute rule with regar to the inclusion or exclusion of the day on which a particula event takes place, and I have to determine the meaning of thi particular deed."

Context. So a demurrer to a declaration was overruled on the groun that the context showed that the word "from" was use inclusively. "The demurrer therefore is wrong in assuming tha the word must be exclusive; though I agree that *prima facie* it i so" *per* Patteson, J., *Wilkinson* v. *Gaston* (1846), 9 Q. B. 137 at p. 145; 15 L. J. Q. B. 339; 72 R. R. 198.

But the presumption still is that the day in question is excluded

Tenancy. A lease, habendum from March 25, 1809, for twenty-one year expires at midnight on March 25, 1830. "The general under standing is that terms for years last during the whole anniversar of the day from which they are granted": *per* Denman, C.J. *Ackland* v. *Lutley* (1839), 9 Ad. & E. 879, at p. 894; 8 L. J Q. B. 164; 48 R. R. 729, and *per* Shadwell, V.-C., *Gorst* v *Lowndes* (1841), 11 Sim. 434, at p. 436. A tenancy was grante "from March 25" *semble*, the tenancy commenced at midnigh on March 25: *Meggeson* v. *Groves*, [1917] 1 Ch. 158; 86 L. J. Ch 145.

Statutes. By 16 & 17 Vict. (1852), c. 5, s. 2, "all letters patent shall b made subject to the condition that the same shall be void . . at the expiration of three years . . . from the date thereof unles there be paid before the expiration of the said three years" certai stamp duties. Letters patent dated February 26, 1855, were issue subject to this condition; the duty was paid on February 26, 185 *Held*, the payment was in time, "If the language of the Act ha been three years from the day of the date thereof then there can b no doubt that the three years would not have begun to run unt the following day, for when the time for doing an act begins to ru from a particular date it commences on the day following. He the words are, from the date thereof, which are synonymous" *per* Lord Romilly, M.R., *Williams* v. *Nash* (1859), 28 B. 93, pp. 94, 95; 28 L. J. Ch. 886; 126 R. R. 38.

Promissory note. Where the time for payment of a promissory note expired o September 22, 1906, and the writ was issued on September 2 1912, it was held that as the cause of action was complete at th commencement of September 23, 1906, that day must be include

the six years under the Statute of Limitations, and the writ was) late : *Gelmini* v. *Moriggia*, [1913] 2 K. B. 549; 82 L. J. K. B.); see *Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161; 61 L. J. C. 63.

As to the meaning of "since" and "from" with reference to e Rent Restriction Acts, see *Goldsmith* v. *Orr*, [1920] W. N.); 89 L. J. K. B. 901; *Raikes* v. *Ogle*, [1921] 1 K. B. 576; 90 J. K. B. 588; *Brakspear & Sons* v. *Barton*, [1924] 2 K. B. ; 93 L. J. K. B. 801.

Policy.

A policy of insurance for twelve calendar months from ovember 24, 1887; an accident occurred on November 24, 1888. *eld*, November 24, 1887, was excluded from, and November 24, 88, was included in, the twelve months : *South Staffordshire amways Co.* v. *Sickness and Accident Assurance Association*, 891] 1 Q. B. 402; 60 L. J. Q. B. 260.

"The rule is now well established that where a particular time given, from a certain date, within which an act is to be done e day of the date is to be excluded" : *per* Mathew, L.J., *ldsmiths' Co.* v. *West Metro. Ry.*, [1904] 1 K. B. 1, at p. 5; L. J. K. B. 931; but this dictum would appear to require odification in view of *English* v. *Cliff* (*supra*).

On a date is inclusive of that date.

In computing a period of time which commences on a fixed day, that day is included.

Thus, on an agreement to let a house to a yearly tenant comncing *on* May 19 the tenancy ends on May 18 following : *lebotham* v. *Holland*, [1895] 1 Q. B. 378; 64 L. J. Q. B. 200, ed in *Re Lancashire and Yorkshire Bank's Lease*, [1914] 1 Ch. 2, at p. 526; 83 L. J. Ch. 577; *Sheffield Corporation* v. *Sheffield ctric Light Co.*, [1898] 1 Ch. 203; 67 L. J. Ch. 113.

Commencement of tenancy under a yearly tenancy agreement where tenant comes into possession in the middle of a quarter.

The general principle as to a tenant from year to year is stated Lord Ellenborough in *Doe* v. *Johnson* (1806), 6 Esp. 10; R. R. 800 : "If the tenant comes in in the middle of a quarter l he afterwards pays his rent for that half quarter, and continues n to pay from the commencement of a succeeding quarter, he not a tenant from the time of his coming in, but from the ceeding quarter day." In *Sidebotham* v. *Holland* (*supra*), the eement stated that the tenancy was "commencing on the 19th y, 1890," an apportioned part of the rent "up to June 24 next" be paid at once, the future rent being payable quarterly in ance on the usual quarter-days. Apart from express terms in agreement to the contrary, the principle applies. *Croft* v. *y*, [1919] 2 Ch. 343, where the statement in Cole on Ejectment, 50, repeated in other text-books, is disapproved; and see

Meggeson v. *Groves*, [1917] 1 Ch. 158; 86 L. J. Ch. 145, as to misleading headnote in *Sidebotham* v. *Holland* (*supra*).

"At," "on," and "from."

"In considering the validity of a notice to quit given in time and expiring on the anniversary of the commencement of a tenancy I can find no distinction ever drawn between tenancies commencing 'at' a particular time or 'on' a particular day and 'from' the same day. 'At,' 'on,' 'from' and 'on and from' are for this purpose equivalent expressions": *per* Lindley L.J., *Sidebotham* v. *Holland* (*supra*), at p. 384. See *W. H. Brakspear & Sons, Ltd.* v. *Barton*, [1924] 2 K. B. 88, at p. 94; 93 L. J. K. B. 801.

"From an event" includes day on which event happens.

> In computing a period of time from the doing of an act or the happening of an event, the day on which the act is done or the event happens is *prima facie* to be included, but the context or other admissible evidence may show that it is to be excluded, and more especially if a different method of computation would cause a forfeiture or loss of status or liberty.

Rule originally inflexible,

The rule was treated as inflexible until towards the end of the eighteenth century: Co. Litt. 46 b and note 255 a; Co. 3 Inst. 53; *Clayton's Case* (1585), 5 Rep. 1; *Higham and Cooke's Case* (1589), 4 Leon. 144; *Norris* v. *Hundred of Gawtry* (1616), Hob. 139; 1 Brownl. & G. 156; Moore, 878 (this report is wrong); *Scavage* v. *Parker* (1622), Cro. Jac. 647; *Cornish* v. *Cawsey* (1648), Aleyn, 77; *Clark's Case* (1653), Styl. 382; *Bellasis* v. *Hester* (1698), 1 Ld. Raym. 280; *S. C. sub nom. Belasyse* v. *Hester*, Lutw. 1589; *R.* v. *Adderley* (1780), 2 Dougl. 463; *Castle* v. *Burditt* (1790), 3 T. R. 623; and it was first disregarded in *Ex p. Fallon* (1793), 5 T. R. 283, where a deed which was required by statute to be enrolled within twenty days of the execution was executed on June 6 and enrolled on the 26th, and it was held that it was enrolled in time; and in *Lester* v. *Garland* (1808), 15 Ves. 248; 10 R. R. 68, where an interest under a will was to be forfeited if a certain act was not done within six calendar months after the testator's decease; the testator died on January 12, and the act was done on July 12, and was held to have been done in time. And since those cases "no general rule exists for the computation of time either under the Bankruptcy Act or any other statute, or indeed where time is mentioned in a contract, and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made": *per* Lord Esher, M.R., *Re North, Ex p. Hasluck*, [1895] 2 Q. B. 264, at p. 269; 64 L. J.

but now gives place to intention.

B. 694, and accordingly in the following cases the day was cluded.

Power to redeem.

The statutes give an Irish tenant power to redeem his holding :er he has been ejected for non-payment of rent "within six onths after execution executed." Execution was executed on ovember 30, and the bill to redeem filed on May 30. *Held*, lowing *Ex p. Fallon*, and rejecting the construction which would ork a forfeiture, that the six months were to be computed clusively of the day on which execution was executed: *Dowling Foxall* (1809), 1 Ball & B. 193.

Notice of damage.

By 9 Geo. 1 (1722), c. 22, no person shall recover any damages der that Act unless he, within two days after such damage or jury done him, shall give notice. The damage was done on a turday, the notice was given on Monday. *Held*, the notice was time: *Pellew* v. *Hundred of East Wonford* (1829), 4 Mann. & y. 130; 9 B. & C. 134.

Time for action.

By 24 Geo. 2 (1750), c. 44, "no action shall be brought against y justice of the peace unless commenced within six calendar onths after the act committed." The plaintiff was discharged om prison on December 14; on June 14 following he began an tion against the magistrate. *Held*, the suit was begun in time: *ardy* v. *Ryle* (1829), 4 Mann. & Ry. 295; 9 B. & C. 603. See *adcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161; 61 L. J. M. C. 63.

Payment for goods.

Contract on October 5 for sale of goods to be paid for in two onths. Writ issued December 5. *Held*, on motion for new trial, at (a) months having been treated by both parties at the trial calendar months, it was too late to argue that they were lunar onths; and that (b) the day of the contract was to be excluded: *ebb* v. *Fairmaner* (1838), 3 M. & W. 473; 7 L. J. Ex. 140; R. R. 690. "The party is to have two entire calendar months which to make payment exclusively of the day of sale": *per* rke, B., 3 M. & W., at p. 476.

Time for award.

An umpire was to make his award "within five calendar months xt after the said matters shall be referred to him." He was pointed on June 29, and made his award on November 29. *ld*, it was made in time: *Re Higham and Jessop* (1840), D. P. C. 203; 61 R. R. 608.

Filing warrants.

By 3 Geo. 4 (1822), c. 39, "warrants of attorney shall be filed hin twenty-one days after the execution." *Held*, a warrant ecuted December 9 and filed December 30 was filed in time: *lliams* v. *Burgess* (1840), 12 Ad. & E. 635.

Sale under distress.

By 2 W. & M. (1690), sess. 1, c. 5, s. 2, "where any goods or ttels shall be distrained for any rent . . . and the tenant . . . ll not within five days next after such distress taken and notice reof left . . . replevy the same . . . then . . . after such

distress and notice as aforesaid and expiration of the said five days" the person distraining may sell. Seizure and notice on Saturday, sale on following Thursday. Motion for new trial on the ground that the five days were to be reckoned exclusively of the day of seizure. Rule absolute for new trial: *Robinson* v. *Waddington* (1849), 13 Q. B. 753; 18 L. J. Q. B. 250; 78 R. R. 504.

Time for living in place for marriage.

By 19 & 20 Vict. (1856), c. 96, s. 1, "no irregular marriage contracted in Scotland . . . shall be valid unless one of the parties . . . had lived in Scotland for twenty-one days next preceding such marriage." The parties entered Scotland about 4 a.m. on July 1; they contracted an irregular marriage between 11 and 12 a.m. on July 21. *Held*, the marriage was invalid: *Lawford* v. *Davies* (1878), 4 P. D. 61; 47 L. J. P. 38.

Time for action.

By 12 & 13 Vict. (1849), c. 92, s. 14, every complaint is to be made within "one calendar month after the cause of such complaint shall arise." An information was laid on June 30 in respect of an act committed on the preceding May 30. *Held*, that it was in time: *Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161; 61 L. J. M. C. 63.

Act of bankruptcy.

Under the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 1 (repealed and re-enacted by the Bankruptcy Act, 1914, s. 1, sub-s. 1 (e) and (g)), a debtor commits an act of bankruptcy if his goods are seized in execution and "held by the sheriff for twenty-one days." *Held*, that the day on which the sheriff seizes is not to be included as one of the twenty-one days: *Re North, Ex p. Hasluck*, [1895] 2 Q. B. 264; 64 L. J. Q. B. 694.

Cesser of powers.

Under a special Act incorporating the Lands Clauses Act, 1845, a company was empowered to take lands compulsorily, but such power was to "cease after the expiration of three years from the passing of this Act," the Act received the royal assent on August 9, 1899, and a notice to treat was served under it on August 9, 1902. *Held*, the notice was served within the time limited: *Goldsmiths' Co.* v. *West Metropolitan Ry.*, [1904] 1 K. B. 1; 72 L. J. K. B. 931.

Provisional orders.

Where it was necessary to ascertain which of two provisional orders confirmed by statutes passed upon the same day first came into operation, and they provided that one came into operation on the day of the passing, and that the other took effect from and after the passing of the statute. *Held*, the former was the first to come into operation: *Sheffield Corporation* v. *Sheffield Electric Light Co.*, [1898] 1 Ch. 203; 67 L. J. Ch. 113.

General rule still applies.

But where there is no such reason for excluding the day in question the rule still is that it is included: *Glassington* v. *Rawlins* (1803), 3 East, 407; *Ex p. Farquhar, Re Starkey* (1826), Mont. & Mac. 7; *Cowie* v. *Harris* (1827), 1 Moo. & M. 141; *Higgins* v.

:adam (1829), 3 Y. & J. 1; *Godson* v. *Sanctuary* (1832), . & Ad. 255; *R.* v. *Justices of West Riding* (1833), 4 B. & Ad. ; *R.* v. *Justices of Cumberland* (1835), 4 N. & M. 378; *S. C. nom. R.* v. *Goodenough*, 2 Ad. & E. 463; *Re Prangley* (1836), d. & E. 781; *Ex p. Whitby* (1839), 1 Mont. & Ch. 671.

A contract made on one day to serve a year from the next is a contract not to be performed within a year, and is there- within the Statute of Frauds: *Dollar* v. *Parkington* (1901), L. T. 470. There are *dicta* to the contrary in *Cawthorne* v. *drey* (1863), 13 C. B. (N.S.) 406; 32 L. J. C. P. 152; 134 R. R. ; and *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123; 48 L. J. Ex. ; and *Smith* v. *Gold Coast and Ashanti Explorers, Ltd.*, [1903] . B. 285 and 538; 72 L. J. K. B. 235, is a decision to the trary; but those *dicta* and that decision appear to rest on a fusion between the day on which the service commences and day on which the contract is made.

Contract not to be performed within the year.

Certain phrases have been construed to mean that the term is be computed exclusively of the day in question, *e.g.*, "clear" s: *R.* v. *Justices of Herefordshire* (1820), 3 B. & Ald. 581; so ny days "at least": *Zouch* v. *Empsey* (1821), 4 B. & Ald. 522; v. *Justices of Shropshire* (1838), 8 Ad. & E. 173; 7 L. J. M. C. 47 R. R. 546; *Mitchell* v. *Foster* (1840), 12 Ad. & E. 472; *ng* v. *Higgon* (1840), 6 M. & W. 49; *Freeman* v. *Read* (1863), . & S. 174; 32 L. J. M. C. 226; 129 R. R. 705; *Mercantile estment and General Trust Co.* v. *International Co. of Mexico*, 93] 1 Ch. 484, n. at p. 489; "a month or more": *Blunt* v. *lop* (1838), 8 Ad. & E. 577; 7 L. J. Q. B. 216; 47 R. R. ; "not less than": *Chambers* v. *Smith* (1843), 12 M. & W. 3 L. J. Ex. 25; 67 R. R. 231; *Re Railway Sleepers Supply Co.* 5), 29 Ch. D. 204; 54 L. J. Ch. 270.

"Clear" days.

"At least."

"Or more."

"Not less."

"Till" and "until" are both ambiguous, and may be either inclusive or exclusive.

"Till" and "until" are ambiguous.

A release of all actions until a named day is not a release of an on the cause of which arises on that day, and where something t to be done till such a day or such an hour it may be done on day or at the hour. And where a period of time is allowed such a day, or such an hour within which an act is to be , the act may be done on the day or at the hour. And rally if some state of circumstances is to continue until such a the whole of that day is included, *e.g.*, a lease until Michaelmas des Michaelmas.

man made a lease for life, rendering rent at Michaelmas, and er leased the same to the executors of the lessee until aelmas, after the death of the lessee. It was affirmed by Cook

Lease.

that in this case it was adjudged that the word "until" shall construed to extend to (*sic*) the term unto the end of the feast St. Michael, and so the rent then due payable by the executor for without such construction no rent should be then due becau the term ended before Michaelmas : *Anon.* (1588), 3 Leon. 211.

Releases. Bond dated July 9 is not discharged by a release dated the sar day releasing all actions *usque diem dati ejusdem scripti*, for t release excludes the ninth day on which it was made : *Newman Beaumond* (1593), Owen, 50.

A release and an obligation bore the same date : the release w of all, etc., *usque ad diem datus*; the obligation was not d charged : *Green* v. *Wilcocks* (1622), 2 Roll. Rep. 255.

"A, on 2nd August, 1 Jam., makes an obligation to B, a afterwards on the same day B releases all actions *usque datu scripti* : the obligation is discharged because date is deliver Otherwise if it had been to the day of the date" : *Rooke Richards* (1633), Hale's MSS. fol. 6 a, cited in Hargrave a Butler's note (8) to Co. Litt. 46 b. As to this distinction, s *supra*, p. 179.

A question arose on a plea whether *usque ad* April 24 includ or excluded that day. Three justices (North, C.J., *dissentient* were of opinion that the word *usque* was exclusive, and said th in a release of all demands till April 26 a bond dated that d is not released : *Nichols* v. *Ramsel* (1677), 2 Mod. 280.

To an action for trespass the defendant pleaded a general relea of all actions, etc., *usque ad diem datus* of the release. T trespass was on the day of the date of the release, and it was he that the action was not discharged, for the release did not inclu that day : *Dixon* v. *Terry* (1693), 4 Mod. 182.

Occupancy. In an action by the lord of a manor for an amerciament it w necessary to show that the party amerced was an inhabitant with the manor both at the date of the offence and at the date of t holding of the Court leet at which he was amerced. It appear on the record that defendant was an inhabitant from —— co tinually till October 27 in the seventh year of George 2. The Cou leet at which the amerciament was made was held on October 2 *anno* 7 Geo. 2. After verdict for plaintiff it was argued in er that "till" was exclusive; it was held that though it might ha been bad on demurrer, it was cured by verdict : *Wicker* v. *Nor* (1735), Cas. in K. B. temp. Hardwicke, 116.

Service. A hiring on the day after Old Michaelmas until next C Michaelmas, and service beginning on the day of hiring and endi on next Old Michaelmas, is hiring and service for a year so as give a settlement : *R.* v. *Inhabitants of Navestock* (1772), Bu Settlt. Cases, 719.

A man hired himself on the day after Martinmas to serve thence-h until next Martinmas. *Held*, on a question of pauper's lement, that "until" was to be construed inclusively: *R.* v. *abitants of Skiplam* (1786), 1 T. R. 490.

Where an arbitrator's award was to be made on or before the day of Michaelmas term, and the time was extended on motion consent till the first day of Hilary term. *Held*, the award being le on the first day of Hilary term was good: *Knox* v. *Simmonds* 91), 3 Bro. C. C. 358. Award.

An arbitrator under a power in the submission enlarged the e for making his award "until the 1st of July next." On 1 he made his award, and it was held that the award was le in time. "There is no absolute rule as to the meaning to attached to the word 'until,' as it may be construed either as usive or exclusive, as it may with strict propriety mean er": *per* Williams, J., *Kerr* v. *Jeston* (1842), 1 Dowl. (N.S.) at p. 539; 63 R. R. 840.

In an indictment against certain officers of the East India npany under 33 Geo. 3 (1793), c. 52, s. 62, it was alleged that defendants were officers of the company until November 29, 5, and that whilst such officers and residing in India, *viz.*, on ember 29, 1795, etc. *Held*, "until" may be read either usively or exclusively: *R.* v. *Stevens and Agnew* (1804), 5 East, Employment.

Order of Judge that the defendant shall have till Tuesday next to plead. "I meant the word 'till' to include the Tuesday. plaintiff was irregular in signing judgment on that day": *per* eson, J., *Dakins* v. *Wagner* (1835), 3 Dowl. 535, at p. 536. Time to plead.

Stay of execution until May 1 next, and on that day execution issued. It was held that the writ of execution was properly d. "I think the word 'until' does not mean after; it cannot n that according to the grammatical construction": *per* on, J.: *Rogers* v. *Davis* (1845), 8 Ir. L. R. 399, at p. 400. do not think that this differs from the case of an attachment issuing until such a day": *per* Crampton, J., *ibid.* Execution.

An order was made under the Bankrupt Law Consolidation Act, , that the persons and property of the petitioners be protected process until July 29 next, and it was held that the ection extended over the whole of July 29. "The word il' is ambiguous, and may be construed either inclusive or usive of the day mentioned, according to the subject-matter and rue intent of the document in which it is used (*R.* v. *Stevens* 4), 5 East, 244). In this order there can be no doubt it des the whole of July 29, for it appoints twelve o'clock of day as the day of meeting of the creditors and the petitioners, Protection order.

and no doubt the Court intended that until after meeting t protection should extend" : *per* Watson, B., *Bellhouse* v. *Mell* (1859), 4 H. & N. 116, at p. 124; 28 L. J. Ex. 14 118 R. R. 343; *S. C. sub nom. Backhouse* v. *Mellor*, 5 Ju (N.S.) 175.

Insurance.

"From the 14th day of February, 1868, until the 14th day August, 1868," in a policy of insurance against fire. *Held*, t goods were covered during the whole of August 14 without decidi that they were not covered during the whole of February 1 *Isaacs* v. *Royal Insurance Co.* (1870), L. R. 5 Exch. 296; L. J. Ex. 189.

"To" and "from" used with regard to place.

Whether "to" and "from," when used in regard to place, or do not include the place seems very doubtful. Thus an indic ment for stopping at Kensington the King's highway leading fro London to Kensington was quashed, for it alleged the stopping Kensington a road leading to Kensington, which excludes Kensin ton : *Halsey's Case* (1626), Latch, 183.

A turnpike Act (26 Geo. 2 (1753), c. 54) described a road leading "to and from" Battel. *Held*, the town of Battel w excluded : *Hammond* v. *Brewer* (1757), 1 Burr. 376.

Indictment for not repairing a highway leading from the haml of Roxeth in the parish of Harrow, and that a certain part of sa highway in Harrow leading from a part in Roxeth to another pa in Harrow was, etc. Objection that the hamlet is exclude *Sed per Curiam* : The indictment does not say that the part whi is out of repair is in the hamlet. The hamlet is excluded, b there is no repugnancy in the indictment : *R.* v. *Inhabitants Harrow* (1767), 4 Burr. 2090.

An indictment for not repairing a road leading from H towar and unto G quashed on the ground that "unto" is exclusive, a therefore the road was not in the parish of G : *R.* v. *Inhabitan of Gamlingay* (1790), 3 T. R. 513. But after conviction on indictment for wrongfully damaging a culvert in the parish Studley in a certain King's common highway there leading fro Studley to H, a motion was brought in arrest of judgment, on t ground that it did not sufficiently appear that the road obstruct was in the parish of Studley, and it was held that "to" a "from" were not necessarily exclusive, and *R* v. *Gamlingay* w doubted and distinguished : *R.* v. *Knight* (1827), 7 B. & C. 413.

How deeds are dated.

"The day of the moneth and the yeare of our Lord and Savio Christ and the yeare of the King's raigne are the usuall dates deeds. And the day of the moneth by the nones, ides, or kalen is sufficient" : Co. 2 Inst. 675, note 10. In older deeds the Ki and a layman date by the regnal year, a bishop by the year his pontificate, and a clerk by the year of grace. See De Placi

uriis Tenendis, printed in "The Court Baron" by the Selden ety (Sel. Soc. Pub., vol. 4), p. 71.

But the modern practice is to date by the day of the month the year of grace only, except in some official documents of the g or a bishop, in which the old practice is continued.

But the date written on a deed is not of much importance, for—

A deed takes effect from delivery, not from its date.

Deed takes effect from delivery.

The authorities for this proposition are : Y. B. 14 Edw. 3 (1341), 76, pl. 11; Shep. Touch. 72; *Ludford* v. *Gretton* (1575), Plow. at p. 491 a; *Goddard's Case* (1584), 2 Rep. 4 b; *Clayton's* (1585), 5 Rep. 1; *Doe* v. *Telling* (1802), 2 East, 257; *Doe* v. (1809), 10 East, 427; 10 R. R. 345; *Steele* v. *Mart* (1825), . & C. 272; 28 R. R. 256; but the presumption is that a deed elivered on the day of its date : *Stone* v. *Grubbam* (1614), oll. Rep. 3.

But delivery presumed to have been on date.

"All deeds do take effect from, and therefore have relation the time not of their date but of their delivery; and this is ays presumed to be the time of their date, unless the contrary appear" : Shep. Touch. 72.

A demise by deed to hold "from henceforth," means from the very, not from the date : Co. Litt. 46 b; *Clayton's Case* (1585), ep. 1; and includes the day of delivery. "Until the making of e presents" means up to the delivery : *Hedley* v. *Joans* (1572), 307 a, pl. 67.

"From henceforth."

"Until the making."

The words of the deed that he should pay for the corn then *nc*) laden or afterward to be laden therein : this word "*tunc*" eferred to the time of the essence of the deed by the delivery not to the date. "If one covenants that J. S. shall have all trees now standing, it refers to the trees standing at the time elivery, and if any be felled after the date and before the very, he hath not any remedy for them" : *per* Fleming, J., *ey* v. *Hicks* (1610), Cro. Jac. 263.

"Now."

A day "now last past" means last preceding the day of the very, not of the date : *Steele* v. *Mart* (1825), 4 B. & C. 272; owl. & Ry. 392; 28 R. R. 256.

"Now last past."

"The rule uniformly acted upon from the time of *Clayton's Case* e present day is that a deed or other writing must be taken to k from the time of its execution, and not from the date rent on the face of it. That date is indeed to be taken *prima* as the true date of execution, but as soon as the contrary ars, the apparent date is to be utterly disregarded" : *per* eson, J., *Browns* v. *Burton* (1847), 5 Dow. & Lownd. 289, at 92; 2 Bail Court Rep. 220; 17 L. J. Q. B. 49.

A mortgage deed, dated October 27, 1827, was executed o August 23, 1834. No interest was ever paid. On February 1854, the mortgagee issued a writ of ejectment. *Held*, that th deed was a sufficient acknowledgment of the plaintiff's title withi 3 & 4 Will. 4 (1833), c. 27, s. 14. "If then the deed is to b construed as speaking from the time of its date, the plaintiff right of entry was barred by the statute; but if, on the other hand the deed is to be read as speaking from the time of its executio then there was a sufficient acknowledgment of the plaintiff's tit within the meaning of the statute. We are all of opinion that th deed must be taken to speak from the time of its execution": *p* Pollock, C.B., *Jayne* v. *Hughes* (1854), 10 Ex. 430, at p. 433; 2 L. J. Ex. 115; 102 R. R. 661.

An alteration of the date in a deed is not a material alteratio so as to affect its validity: *Crediton* (*Bishop*) v. *Exeter* (*Bishop* [1905] 2 Ch. 455; 74 L. J. Ch. 697.

Evidence admissible to prove true date.

Evidence is admissible to prove the true date *i.e.*, time of delivery of a deed.

Deeds without date.

"The date of the deed many times antiquity omitted; and th reason thereof was, for that the limitation of prescription, or tim of memory, did often in process of time change; and the law wa then holden, that a deed bearing date before the limited time prescription, was not pleadable; and therefore they made the deeds without date, to the end that they might allege them withi the time of prescription": Co. Litt. 6 a.

"Also a deed is good albeit it mentions no time or place of da or making, or have a false date, *i.e.*, be dated at one time an delivered at another; and albeit it have an impossible date, the 30th of February and the like, for anciently until the time Edw. 2 and Edw. 3, the deed had no date; because the law wa then held to be, that if a deed were dated before the time memory it was not pleadable, except it were of record, but it migh have been given in evidence. But he that doth plead such deed without any date, or with such an impossible date, must s forth the time when it was delivered (*Dodson* v. *Kayes* (1610 Yelv. 193), and support the averment by proof": Shep. Touch. 5

False date.

"Not but a deed is good although it mention no date; or hat a false date; or even if it hath an impossible date, as the 30th February: provided the real day of its being dated or given, th is, delivered, can be proved": Blackst. Com. II, 20 (8th ed p. 304).

Impossible date.

"The date of a deed is not of the substance of a deed: for if hath no date, or hath a false or impossible date, as the 30th da of February, yet the deed is good": *Goddard's Case* (1584),

4 b; *Dodson* v. *Kayes* (1610), Yelv. 193; *S. C. sub nom.* *son* v. *Keyes*, 1 Brownl. & Gold. 110; *sub nom. Dobson* v. *s*, Cro. Jac. 261.

An impossible date is no date, and where there is no date the *ntiff* nevertheless must declare of it as made at a certain " : *per Curiam*, *Cromwell* v. *Grunsden* (1698), 2 Salk. 462; , 502; *S. C. sub nom. Cromwell* v. *Grumsden*, 1 Ld. Raym. *sub nom. Cromwell* v. *Grimsdale*, Comb. 477; *sub nom. nwell* v. *Grunsdale*, 5 Mod. 278; *sub nom. Cromwell* v. *Grums-*, 12 Mod. 193.

Date proved.

Deed dated October 10, proof allowed that it was first delivered ch 30. " For God forbid, when a deed is duly made, that negligence or mistake of the clerk in writing the date, the party ld lose the whole benefit of the deed and be without remedy " : *e* v. *Bale* (1692), 3 Lev. 348. *Hall* v. *Cazenove* (1804), 4 East, ; 7 R. R. 611; *Steele* v. *Mart* (1825), 4 B. & C. 272; 28 R. R. ; *Cooper* v. *Robinson* (1842), 10 M. & W. 694; 12 L. J. Ex. 62 R. R. 726; *Doe* d. *Cox* v. *Day* (1809), 10 East, 427; 10 R. 345; and *Jayne* v. *Hughes* (1854), 10 Exch. 430; 24 L. J. 115; 102 R. R. 661, are other cases in which evidence was itted to prove when a deed was delivered.

Reference to date, how construed.

" Where a deed bears no date, or an impossible date, and in the deed reference is made to the 'date,' that word must be construed 'delivery'; but if the deed bears a sensible date, the word 'date,' occurring in the deed, means the day of the date, and not that of the delivery " : *per* Bayley, J., *Styles* v. *Wardle* (1825), 4 B. & C. 908, at p. 911; 4 L. J. (o.s.) K. B. 81; 28 R. R. 501; 7 D. & R. 507, at p. 510.

If an indenture of lease bear date which is void or impossible, e 30th day of February, or the 40th of March, if in this case erm be limited to begin from the date, it shall begin from the ery, as if there had been no date at all " : Co. Litt. 46 b.

Where an undated award ordered that a certain act should be within fifty-eight days, *a datu scripti arbitrii*, held there was ncertainty, for if the award had no date the time must be uted from delivery, and that was one sense of *datus* : *Armitt reame* (1704), Ld. Raym. 1076, at p. 1082; 1 Salk. 76; *S. C. nom. Arnote* v. *Breame*, 6 Mod. 244; *sub nom. Armote* v. *m*, Holt, 212.

bligation dated and delivered May 1, and on June 1 following ee makes a release to obligor bearing date March 1 and

delivered June 1, by which he releaseth all actions until the dat of the release. *Held*, the obligation was not released : *Sir Willia Drury's Case* (1582), Cro. Eliz. 14.

A release of all actions until this present day : this present da means the day of the date, not of delivery, and therefore the releas does not discharge a bond dated and made after the date, bu before the delivery of the release : *Anon.* (1609), 2 Brownl. & G 300; Hale's MSS., fo. 6; cited note to Co. Litt. 46 b (Butler's ed 1832).

A deed purporting to bear date November 20 was executed b one defendant on the 16th of that month, and by another on a da previous. *Held* to be immaterial, it not appearing that a blan was left for the date at the time of execution : *Cockell* v. *Gra* (1822), 6 J. B. Moore, C. P. 483.

Under a power to demise in possession and not in reversion, lease dated February 17, habendum from March 25 next ensuin the date thereof, but executed after March 25, is good : *Doe* v. *Da* (1809), 10 East, 427; 10 R. R. 345.

Day in same month.

A bond bearing date May 1, conditioned for payment of mone on May 15 next ensuing, means the 15th of the same month *Prescot* v. —— (1622), Cro. Jac. 646.

Obligation bearing date May 5, conditioned to pay money o May 11 next ensuing; it means the same May : *Anon.* (1622 2 Roll. Rep. 255.

"Punctual payment."

Contract conditioned on "punctual payment" : *Maclaine* v *Gatty*, [1921] 1 A. C. 376; 90 L. J. P. C. 73.

Leap-year.

Where by a deed made in August, 1832, being leap-year, a part covenanted to pay a sum of money on February 29 next ensuin the words, "29th February next ensuing" were construed t mean February 29 in the next leap-year : *Chapman* v. *Beecha* (1842), 3 Q. B. 723; 3 Gale & Dav. 71; 12 L. J. Q. B. 42; 6 R. R. 373.

Evidence is admissible to explain an erroneous reference to th date of another instrument : *Honywood* v. *Honywood* (1843), 2 Y & C. C. C. 471.

Parol evidence admissible to show date of undated instrument.

"When a written document contains no date, parol evidenc is admissible to show when it was written and from what date was intended to operate" : *per* Astbury, J., in *Morrell* v. *Stud and Millington*, [1913] 2 Ch. 648, at p. 658.

Evidence to correct name or description of parties.

Evidence may be adduced to correct a erroneous or imperfect name or description of an party to a deed. See 1 Dav. Prec. 41 (5th ed. p. 33.

"The name of the persons in grants is set down only to di

ıish persons, and to make the person intended certain; and, efore, howsoever it be best and most safe to describe the person ıis true and proper name of baptism, and also by his surname, if it be a corporation, by the true name whereby the oration is made, yet mistakes in this case, unless they be very s, will not make void the grant; *nihil facit error nominis cum orpore constat*" : Shep. Touch. 233.

Name of baptism.

Regularly it is requisite that the purchaser be named by the e of baptism and his surname, and that special heed be taken ıe name of baptism; for that a man cannot have two names of ism, as he may have divers surnames": Co. Litt. 3 a; *Donnogh* v. *Stafford* (1619), Palm. 100. In strictness all the es of baptism compose but one christian name: *per* Sir W. t, *Pougett* v. *Tomkyns* (1812), 3 M. & S. 262, n. at p. 263; . R. 480; see also *Scott* v. *Soans* (1802), 3 East, 111; *Evans* v. (1745), Willes, 554.

But a person may be baptized by the name of A and con- ed by the name of B, as Sir Francis Gawdy was; not that nk the first name ceased": *per* Holt, C.J., *Holman* v. *Walden* 3), Holt, 492; 1 Salk. 6; *S. C. sub nom. Walden* v. *Holman*, d. 115.

Name by repute.

Yet there may be cases where names acquired by use and may be taken by repute as the true christian and surname e parties": *per* Sir W. Scott, *Frankland* v. *Nicholson* (1805), & S. 259, n. at p. 260; 15 R. R. 478.

If the person be so described that he may be certainly known other persons, the omission, or in some case the misprision, of ame of baptism, shall not avoid the grant; as a gift, '*omnibus J. S.*,' or '*primogenito filio J. S.*,' or '*uxori de J. S.*,' or *e de J. S.*,' when there is but one. The name of baptism of bbot of W. was *Richerus*, and he by the name of *Richardus*, t de W., made a grant; and although his name of baptism was ken, yet because the other words, *sc.* '*Abbas de W.*,' did nly describe the person, for his cause the grant, notwithstand- he misprision of the name of baptism, was good. So, if a be made to J. S. *et Margaretae uxori suae* where the wife's is *Margeriae* or to J. S. *et Mariottae uxori suae* where the name is Marion, yet the grant is good although the name ptism be mistaken because *uxori suae* is a certain description e person": *Dr. Ayray's Case* (1613), 11 Rep. 18 b, at a.

Mistake in name.

Name by description.

here articles of association authorised the nomination by the ıry form of a proxy. *Held*, that the nomination of any person night be a partner in a certain firm was sufficient, and that on who was a partner, when the vote was given, but was not

a partner when the proxy was signed, could act under the nomin tion : *Bombay Burmah Trading Corporation* v. *Dorabji Curse Shroff*, [1905] A. C. 213; 74 L. J. P. C. 41.

Change of surname.

A man may change his name, *i.e.*, his surname, as often as likes, no fraud being intended : *per* Tindal, C.J., *Davies* *Lowndes* (1835), 2 Scott, 71, at p. 103; 53 R. R. 266; 1 Bing. N. 597, at p. 618. See also *Leigh* v. *Leigh* (1808), 15 Ves. 92, p. 100; 10 R. R. 31; *Doe* v. *Yates* (1822), 5 B. & Ald. 544; R. R. 468; *Re James* (1850), 5 Ex. 310; *Re Dearden* (1850), 5 E 740; *Re Gimlet* (1863), 11 W. R. 210. And it is not necessary th he should obtain an Act of Parliament or a royal licence, or execu a deed poll, or issue advertisements, for a surname may be acquire by assumption and reputation only, which are matters of fact be proved by evidence : *Re Croxon*, [1904] 1 Ch. 252; 73 L. Ch. 170.

But where a testator bequeathed a legacy to an infant spinst in case she should marry " any person of the surname of Barlow " and she married a man whose father's name was Bateman, b who, prior to the marriage, assumed the name of Barlow for t purpose of complying with the will. *Held*, in Dom. Proc. reversi Jekyll, M.R., that the legatee had not complied with the conditio and she and her husband were not entitled to the legacy : *Barlo* v. *Bateman* (1735), 2 Bro. P. C. 272.

Divorced woman.

" Marriage confers a name upon a woman which becomes h actual name, and she can only attain another by reputation " : *p* Hannen, P., *Fendall* v. *Goldsmid* (1877), 2 P. D. 263, at p. 26 46 L. J. P. 70; and when a commoner who has married a divorced a peer marries another commoner, she cannot be restrain by the peer from using the title, though she has no legal rig thereto : *Cowley* v. *Cowley*, [1900] P. 305; 69 L. J. P. 12 [1901] A. C. 450; 70 L. J. P. 83.

Party described by incorrect name.

Where a person is described in a deed, and executes it, by t name by which he usually passes, which is not his correct nam the deed will be upheld on evidence of identity being given : *Gou* v. *Barnes* (1811), 3 Taunt. 504; *Shaw* v. *Hunt* (1818), 8 Taun 645; *Addis* v. *Power* (1831), 7 Bing. 455; *Williams* v. *Bry* (1839), 5 M. & W. 447; 9 L. J. Ex. 47; 52 R. R. 793. A a marriage after banns in which the usual though not the baptism name of the husband was given, was held good : *R.* v. *Billinghu* (1814), 3 M. & S. 250; 15 R. R. 474.

Where a man was called by an incorrect name throughout deed, but executed it by his correct name, the deed was uphe as his deed : *Janes* v. *Whitbread* (1851), 11 C. B. 406, 413; L. J. C. P. 217; 87 R. R. 708. See Viner, Abr. tit. Faits, B.

Firm.

Where a firm is made a party to a deed, evidence is admissi

how who in fact constituted the firm at that time : Lindley on tnership, Bk. I, c. 7, s. 2 (9th ed., p. 153); *Carruthers* v. *ldon* (1815), 6 Taunt. 14; *Maugham* v. *Sharpe* (1864), 17 C. B. .) 443; 34 L. J. C. P. 19; 142 R. R. 439.

'The case of *Maugham* v. *Sharpe* (*supra*) is a very apt and ent illustration of a very familiar principle of law, that where are dealing with a grantee, you may describe that grantee in way which is capable of ascertainment afterwards; you are not nd to give him a particular name; you are not bound to give christian name or his surname; you may describe him by any ription by which the parties to the instrument think it right lescribe him" : *per* Lord Halsbury in *Simmons* v. *Woodward*, 92] A. C. 100, at p. 105; 61 L. J. Ch. 252.

A conveyance was made to "Wm. Wray"; in fact, that was name under which four persons carried on business in partner-, one of whom, with the concurrence of the others, signed the e Wm. Wray on the conveyance. *Held*, that the legal estate sed to the four partners as joint tenants : *Wray* v. *Wray*, [1905] h. 349; 74 L. J. Ch. 687.

Class.

The individuals composing a class which is capable of being rtained may be made parties by the name of that class, as l a man's creditors" : *Gresty* v. *Gibson* (1866), L. R. 1 Ex. ; 35 L. J. Ex. 74; *Reeves* v. *Watts* (1866), L. R. 1 Q. B. 412; L. J. Q. B. 171; *M'Laren* v. *Baxter* (1867), L. R. 2 C. P. 559; L. J. C. P. 247; *Isaacs* v. *Green* (1867), L. R. 2 Ex. 352; 36 J. Ex. 253.

Corporation.

Though a corporation should be described by its proper name, by the name by which it was incorporated, it is sufficient to such name as will identify it : *Dr. Ayray's Case* (*supra*, p. 193); *ch West India Co.* v. *Van Moses* (1725), 1 Stra. 612; *S. C.* ppeal, *sub nom. Henriques* v. *General, etc., to West Indies* 8), 2 Ld. Raym. 1532; *Croydon Hospital* v. *Farley* (1816), unt. 467; Grant on Corporations, pp. 50 *et seq.* See also, on question what variances from the true name of the corporation material : *The Case of the Corporation of the Cathedral Church arlisle* (1568), Dy. 278; *Croft* v. *Howel* (1577), Plowd. 536 a; *hawe's Case* (1587), Moore, 228; *S. C. sub nom. Mariot* v. *al*, 1 Anders. 202; on appeal, *sub nom. Marriot* v. *Pascall* 8), 1 Leon. 159; *Button* v. *Wrightman* (1593), Poph. 56; *Pits mes* (1614), Hob. 121; *Butler* v. *Fincher* (1615), 1 Roll. Rep. 2 Bulstr. 302.

he King incorporated a borough by the name of the Mayor and esses of his borough of Lynne Regis, commonly called King's e; a person became bound to the corporation in a bond by the of the Mayor and Burgesses of Lynne Regis. *Held*, that the

bond was good. The name of a corporation in grants or co veyances need not be *idem syllabis seu verbis*; it is sufficient if be *idem re et sensu* : *Mayor and Burgesses of Lynne Regis' Cas* 10 Rep. 122 b.

False description of party.

A false description of a party will not vitiat the deed, where it is clear what person is meant.

Conveyance made to Rodolf Evers, Knight, Lord Evers. *Hel* that the conveyance was good, though at the time it was mad he was not a knight nor reputed to be a knight : *Evers* v. *Strick land* (1610), 1 Bulstr. 21; though it has been said that a grant t a knight by the name of Esq., and *vice versa*, is void : *R.* v. *Bisho of Chester* (1697), 1 Ld. Raym. 292, at p. 303; Carth. 440.

Bastard.

A bastard can be made a party by his name of reputation Co. Litt. 3 b; and he may be described as the "son" of his repute father when he has acquired the reputation of being so : *Finch Case* (1606), 6 Rep. 63 a, at p. 65 a.

Reputed wife.

Where a woman who had gone through the ceremony marriage which was afterwards discovered to be invalid, execute a deed by the description of "Eliza, the wife of" the repute husband, the description was held sufficient : *Boughton* v. *Sand lands* (1811), 3 Taunt. 342.

Party for specific purpose.

"Where a person joins as a party for a specific purpose h cannot be considered as having joined for a wholly differen purpose" : *per* Parker, J., *Re Horsfall, Hudleston* v. *Crofto* [1911] 2 Ch. 63, 70; 80 L. J. Ch. 480; *Griffith-Boscawen* v. *Sco* (1884), 26 Ch. D. 358; 53 L. J. Ch. 571.

See further as to parties, names, and descriptions, Cruise, Di tit. xxxii, Deed, c. 21, ss. 7 *et seq.*; 3 Dav. Prec. 357, note (m) Elph. Introd. Conv. (7th ed.), pp. 61 *et seq.*

CHAPTER XI.

RECITALS.

iance between Recitals and Operative Part: General and Specific Descriptions: Releases: Misrecitals: Estoppel by Recital: Recital Creating Covenant: Recital Executing Power.

MANY deeds, particularly modern deeds, have recitals, and it etimes happens that the recitals are not consistent with the rative part. When this is the case—

Operative part, if clear, not controlled by recitals.

If both the recitals and the operative part of a deed are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred.

"If the recitals are ambiguous and the operative part is clear, the operative part must prevail": *per* Lord Esher, M.R., *Ex p. Dawes* (1886), 17 Q. B. D. 275, at p. 286.

Specific description in operative part not controlled by general description in recitals

It follows that a specific description of property, or a specific statement of what is intended to be done, contained in the operative part will not be controlled by a general description, or a general or ambiguous statement, contained in the recitals.

"The reciting part of a deed is not at all a necessary part either w or equity. It may be made use of to explain a doubt of the ntion and meaning of the parties, but it hath no effect or ation. But when it comes to limit the estate, there the deed is ave its effect according to what limitations are therein set , and that is plain and full, without any manner of contradic- whatsoever": *per* Holt, C.J., *Bath and Mountague's Case* 3), 3 Ca. Ch. 55, at p. 101.

Where the operative part of the deed uses language which ts of no doubt it cannot be controlled by the recital": *per* h, M.R., *Bailey* v. *Lloyd* (1829), 5 Russ. 330, at p. 344; J. (o.s.) Ch. 98; 29 R. R. 30.

"When the words in the operative part of a deed of conveyan are clear and unambiguous, they cannot be controlled by t recitals or other parts of the deed": *per* Patteson, J., *Walsh Trevanion* (1850), 15 Q. B. 733, at p. 751; 19 L. J. Q. B. 458, p. 462; 14 Jur. 1134, at p. 1136; 81 R. R. 775.

"It is impossible by a recital to cut down the plain effect of t operative part of a deed": *per* Romilly, M.R., *Holliday* v. *Overt* (1852), 14 Beav. 467, at p. 470; 21 L. J. Ch. 769; 92 R. 176.

"It is of the greatest consequence to keep distinct the differe parts of deeds, and to give to recitals and to the operative pa their proper effects. I have always held that where the recita and the operative part of a deed are at variance, the operati part must be officious, and the recitals inofficious. I do not s inoperative, for the recitals may be useful in explaini ambiguities": *per* Romilly, M.R., *Young* v. *Smith* (1865), L. 1 Eq. 180, at p. 183; 35 Beav. 87, at p. 90; 11 Jur. (N.S.) 96 147 R. R. 39.

"I am not aware of any authority in which a clear, precise, a specific description of property in the operative part of a deed h been controlled at law by the effect of mere recitals, or by inferen from the covenants or subsequent parts of the deed": *p* Jessel, M.R., *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 E 378, at p. 394.

"If there is any doubt about the construction of the governi words of that document, the recital may be looked at in order determine what is the true construction; but if there is no dou about the construction, the rights of the parties are govern entirely by the operative part of the writing or deed": *p* Brett, L.J., *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, at p. 31 51 L. J. Ch. 90. See also *Lee* v. *Alexander* (1883), 8 App. Ca at pp. 862, 869.

"The rule is that a recital does not control the operative pa of a deed where the operative part is clear": *per* Jessel, M.R *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, at p. 358.

Examples.

Where the condition of an indemnity bond, after referring to t recited transactions, continued: "or on any other account the after to subsist between" the debtor and the plaintiff, it was he that the extent of the condition was not restrained by the recital *Sansom* v. *Bell* (1809), 2 Camp. 39.

Bond.

Where a bond was taken in the penalty of £1,000, *Held* that t penalty could not be cut down to £500 by a recital that the parti had agreed to execute a bond for that amount: *Ingleby* v. *Sw* (1833), 10 Bing. 84; 3 Moo. & Sc. 488.

In the absence of special provisions, nothing can be recover

a bond beyond the amount of the penalty : *Hatton* v. *Harris*, 92] A. C. 547; 62 L. J. P. C. 24.

Bond securing repayment of all moneys whatsoever due and ng on an account current, reciting a desire for advances over above an amount of £2,500 already secured by the obligor's rantee, which was subsequently held to be invalid : *Held* that condition of the bond was perfectly plain and that there was inconsistency between it and the introductory recital which ıld control the condition or limit it only to moneys advanced in ess of the £2,500 : *Australian Joint Stock Bk., Ltd.* v. *Bailey*, 99] A. C. 396; 68 L. J. P. C. 95.

Covenant.

If a deed contain an absolute covenant not to do a certain act, h covenant will not be controlled by a recital that the parties ended that, on the payment of a sum of money for liquidated nages, it might be done : *Bird* v. *Lake* (1863), 1 H. & M. 111; R. R. 45.

And a covenant for title is not limited by the fact that the defect the title appears in the recitals : *Page* v. *Midland Ry Co.*, [1894] h. 11; 63 L. J. Ch. 126.

Parcels.

Two partners, to secure a partnership debt, conveyed certain ıt property particularly described in the deed, "and all other hereditaments of them, or *either of them*, situate *elsewhere* in town of M," but the recitals, covenants, and provisions in the d, related solely to the joint property. *Held*, that the deed ended to a separate estate of one of the partners situate in M : *p. Young* (1839), 4 Deac. 185.

By articles, reciting that A had agreed to give a mortgage of is *freehold* estates at I, *subject to the charge affecting the ne*," A agreed to execute a mortgage of "all his lands, ements, and hereditaments, at or near I aforesaid." *Held*, that yhold property and also freehold property, not subject to the rge, were subject to the agreement : *Ex p. Glyn* (1840), 1 M. D. De Gex, 29.

A marriage settlement contained a recital of an agreement to le a certain estate "except the town and lands of B and its -denominations." The operative part conveyed, *inter alia*, K, ch was one of the sub-denominations of B. *Held*, that it sed : *Alexander* v. *Crosbie* (1835), Ll. & Goo. *temp.* Sugden, ; see *per* Sugden, C., at p. 152; 46 R. R. 183.

Transfer of mortgage.

Transfer of a mortgage, containing a recital that "in the now ting indenture a power of sale is contained for the better ıring of the principal sum and interest, but the said power has been, and is not intended to be exercised," followed by assign- ıt of the moneys due on the mortgage, "and all powers and edies for recovering the same sums respectively, and all benefit

of the said several indentures of mortgage, and of every covenar and security therein respectively contained." *Held*, that th power of sale in the recited mortgage was capable of beir exercised : *Boyd* v. *Petrie* (1872), L. R. 7 Ch. 385; 41 L. J. Ch 378.

Settlement.

A power of appointment by the wife during the intende coverture was held not to be extended, so as to be exercisable aft the coverture, by a recital that the provision intended to be mad should be subject to "a power of appointment by will" : *Hollida* v. *Overton* (1852), 14 Beav. 467; 21 L. J. Ch. 769; 92 R. R. 17

A recital in a marriage settlement that it had been agreed tha the husband should enter into the covenant to assign all th interest that the wife might have under the wills or otherwise two named persons then deceased thereinafter contained, wa followed by a covenant by the husband to assign all the intere of the wife under the wills of the two testators or otherwise how soever. Afterwards the wife became entitled to an unappointe share under the marriage settlement of one of the testators. *Hel* that such share was clearly included in the covenant, which coul not be cut down by the recital : *Re Owen's Trust* (1855), 1 Ju (N.S.) 1069.

Covenant to settle.

A marriage settlement recited an agreement that the futu property of the wife should be settled, but the covenant to sett was by the husband alone. *Held*, that the wife was not bound *Hammond* v. *Hammond* (1854), 19 Beav. 29; 105 R. R. 54; *Youn* v. *Smith* (1865), 35 Beav. 87; L. R. 1 Eq. 180; 147 R. R. 39 *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354. And conversely, whe the recital was of an agreement that the husband should covenar to settle the after-acquired property of the wife, followed in th operative part by an agreement by all parties and a covenant b the husband to settle it. *Held*, that property afterwards given the separate use of the wife was bound : *Willoughby* v. *Middlet* (1862), 2 J. & H. 344; 31 L. J. Ch. 683; 134 R. R. 247.

Settlement reciting agreement to settle five distinct denomin tions of lands, specifically described; grant to trustees of thr only of the denominations. *Held*, that the omitted denominatio were not bound by the trusts of the settlement : *Macnamara* *Carey* (1867), 1 Ir. Rep. Eq. 9.

Appointment.

Erroneous recitals in a deed poll of appointment were held n to enlarge the clear words of the appointment : *Re Horsfa* *Hudleston* v. *Crofton*, [1911] 2 Ch. 63; 80 L. J. Ch. 480; followi *Griffith-Boscawen* v. *Scott* (1884), 26 Ch. D. 358, and *Minchin* *Minchin* (1871), Ir. R. 5 Eq. 258, 267.

Private statute.

A private statute, after reciting that it would be for th advantage of the tenant for life and remainderman that certa

led lands should be sold, enacted that the parcels described in second schedule should be vested in trustees for sale. Certain ls not comprised in the settlement were included. *Held*, that enacting words being precise and specific could not be limited the recitals : *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 Eq. ; 43 L. J. Ch. 495.

The case of *Ashwell* v. *Staunton* (1861), 30 Beav. 52; 132 R. R. , where a mortgage recited an agreement to pay the debt with erest, but the proviso for redemption, the covenant to pay and trusts of the proceeds of sale made no mention of interest, and was held that interest was payable, is no exception to the rule, the case was decided on the principle that money payable on a certain carries interest.

Recital of agreement for sale followed by receipt for purchase money.

The rule must be applied with some caution, for, bearing in nd that an agreement for the sale of property, accompanied by payment of the purchase money, operates as a conveyance in uity, it appears that a recital of an agreement for the sale of ckacre and Whiteacre for a certain sum, followed by a conance, "in pursuance of the recited agreement and in considera- of the said sum of £—— (the receipt, &c.)," of Blackacre only, operate in equity as a conveyance of Whiteacre also. But a ital of an agreement for the sale of Blackacre for a certain sum, owed by a conveyance of Blackacre and Whiteacre for that sum, pears to fall within the rule.

Ambiguous operative part controlled by clear recitals.

"If the recitals are clear and the operative part of a deed is ambiguous, the recitals govern the construction" : *per* Lord Esher, M.R., *Ex p. Dawes* (1886), 17 Q. B. D. 275, at p. 286.

Specific statement in recitals not enlarged by general statement in operative part.

It follows that a specific description of property, or a specific statement of what is intended to be done, contained in the recitals, will not be enlarged by a general description, or a general or ambiguous statement, contained in the operative part. See Dart, V. & P. c. 11, s. 3 (7th ed.), p. 548; 1 Dav. Prec. (5th ed.), p. 41; Burton, Comp. s. 530.

"If the operative part of a deed be doubtfully expressed, there recital may safely be referred to as a key to the intention of parties" : *per* Leach, M.R., *Bailey* v. *Lloyd* (1829), 5 Russ. , at p. 344; 7 L. J. (o.s.) Ch. 98; 29 R. R. 30.

"On the other hand, when those words" (*sc.* the words in the rative part of a deed) "are of doubtful meaning, the recitals and r parts of the deed may be used as a test to discover the

intention of the parties and to fix the true meaning of thos words" : *per* Patteson, J., in *Walsh* v. *Trevanion* (1850), 15 Q. B 733, at p. 751; 19 L. J. Q. B. 458, at p. 462; 14 Jur. 113 at p. 1136; 81 R. R. 775.

"As to the construction of the settlement, I do not dispute th proposition which was argued, that if you find in a settlemen recitals indicating various parcels enumerated, from whence it is t be inferred, from reading the recital alone, that these parcels, an these alone, are to be included in and made subject to the pro visions of the deed, but yet you find that in the operative part o the deed one or two of these parcels are omitted (see *Macnamar* v. *Carey* (1867), 1 Ir. Eq. Rep. 9), the Court may be of opinion upon the construction of the deed, that the parcels which ar omitted in the operative part are omitted by mistake, and are no included in the provisions of the deed (*sc. sed quaere*, are omitte and are not included, &c., by mistake). And the converse of tha proposition is also true : parcels may be included in the operativ part of the deed which the recitals and the rest of the deed sho to have been inserted there by mistake. There are several cases t that effect, and amongst them the well-known case, before Lor Mansfield, of *Moore* v. *Magrath* ((1774), 1 Cowp. 9)" : *pe* Romilly, M.R., *Barratt* v. *Wyatt* (1862), 30 Beav. 442, at p. 443 31 L. J. Ch. 652; 6 L. T. (N.S.) 801; 132 R. R. 349.

"Where the recital is that you intend to convey certain specif property, and the general words in the habendum, includin 'interest,' and the like, are sufficiently large to carry other propert which is not specified, and is distinct from that which is specifie in the recital, that other property does not pass" : *per* Lor Romilly, M.R., *Neame* v. *Moorsom* (1866), L. R. 3 Eq. 91, a p. 97; 36 L. J. Ch. 274.

"Though the words used might by themselves be capable o a different meaning, we may call in aid the recitals to explai them. . . . The right course then is not to reform or correct th instrument, but to construe it by the light of the recitals" : *pe* Channell, B., *Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Ex. 20 at p. 219; 37 L. J. Ex. 122.

"Nothing I consider is better settled than that these gener words, even where they would pass the land *ex vi terminorum*, a restricted by the recitals and what is called the scope of th instrument. . . . The principle is, that though words of specif description are not easily dealt with, yet general words are; ar that though general words may be in themselves large enough, . . yet if, upon the whole scope of the instrument, as to which especi regard is to be had to what I call introductory recitals, it appea it was not the intention of the parties to pass those propertie

vill not pass them" : *per* Jessel, M.R., *Howard* v. *Earl of* ewsbury (1874), L. R. 17 Eq. 378, at p. 391; 43 L. J. Ch. 495.

"Another thing which I think we may consider settled by nority is that where the words of a covenant are ambiguous difficult to deal with, we may resort to the recitals to see ther they throw any light on its meaning" : *per* Jessel, M.R., *Michell's Trusts* (1878), 9 Ch. D. 5, at p. 9; 48 L. J. Ch.

"Where the words in the dispositive or operative part of a deed onveyance are clear and unambiguous they cannot be corrected reference to other parts of the instrument. Where those words susceptible of two constructions the context may properly be rred to for the purpose of determining which of the two con- ictions is the true meaning. In order to justify a reference to context for this purpose, it is not necessary that the language the dispositive or operative clause should be ambiguous in the se that without some help you cannot tell which of two meanings uld be taken. The rule applies though one of the two meanings he more obvious, and would necessarily be preferred if no light ld be derived from the rest of the deed. For the purpose of struing the dispositive or operative clause the whole of the rument may be referred to, though the introductory narrative recitals leading up to that clause are perhaps more likely to nish the key to its true construction than the subsidiary clauses he deed" : *per* Lord Macnaghten, *Orr* v. *Mitchell*, [1893] A. C. , at p. 254.

Examples. Covenant.

Where the operative part of a deed (which was not by way of sent conveyance but of covenant) appeared to have been intended ollow, but did not accurately follow, the words of a recital, the ct of the operative part was limited to the extent pointed out by recital : *Re Neal's Trusts* (1857), 4 Jur. (N.S.) 6; 111 R. R. 863.

Where a general covenant to pay an annuity followed a recital t it was to be payable out of the covenantor's salary, the ility to pay was held to determine when the salary ceased : *se* v. *Albert* (1828), 3 Man. & Ry. 406.

In a separation deed, after a recital that the husband had agreed llow the wife 5s. per week for her maintenance during her life long as she should remain chaste, such weekly payments to mence as from a date named, the husband covenanted duly and ctually to pay the said sum of 5s. per week to the wife on urday in each week. *Held*, that the covenant, being ambiguous, controlled by the recital, and that the husband's liability ceased the wife's failure to remain chaste : *Crouch* v. *Crouch*, [1912] . B. 378; 81 L. J. K. B. 275.

A deed poll, reciting the conveyance of land in consideration of

an annual rent to be paid to the vendor or the person to whom th inheritance of the premises conveyed should for the time bein belong in case the said conveyance had not been made, containe a covenant with the vendor and with the person to whom th inheritance of the conveyed premises "shall for the time bein belong" to pay the rent. *Held*, that the terms of the deed pol were explained by the recitals and also by a later deed: *Gwyn* v *Neath Canal Co.* (*supra*, p. 202).

A recital in a transfer of mortgage that the transferees, who wer a solicitor and a surveyor, "should be entitled to make the sam charges and to receive the same remuneration respectively for al business done by them respectively in or about these presents" a if they had not been mortgagees, was followed by a covenant by th mortgagor to pay the principal and interest and "every other sur which may hereafter be advanced or paid by the transferees o either of them to or become owing to them or him by" th mortgagor. *Held*, that the latter words were limited by the recital to moneys owing in respect of the mortgage: *Field* v. *Hopkin* (1890), 44 Ch. D. 524.

Parcels.

In a case where there were no recitals the settlor, in considera tion of love and affection, and for settling the one undivided moietie of the hereditaments thereinafter mentioned, granted the on undivided moieties of all those manors, etc., following, describin them, together with all other the settlor's lands, tenements an hereditaments in Ireland, habendum the said undivided moietie with their appurtenances, together with all other the settlor's estat in Ireland, unto uses thereinafter declared, but uses were declare of the moieties only. *Held*, that no part of the settlor's othe estates in Ireland passed: *Moore* v. *Magrath* (1774), 1 Cowp. 9 Lofft, 398.

A settlor entitled to a mansion, thirteen fields and mills, recite his intention to settle "the property thereinafter particularl mentioned," and settled the mansion house and eight fields, all o which were particularly described in the parcels following, wit general words wide enough to pass the other five fields. *Held*, that having regard to the recitals and the particularity of the parcel the general words did not pass the other five fields: *Doe* v. *Meyric* (1832), 2 Cr. & J. 223; 1 L. J. Ex. 73; 37 R. R. 687.

Lease, reciting former demise of the parcels, described as "fifty nine acres provincial measure"; and an intention to demise th "said estate," demised "the same being forty-five acres statut measure." *Held*, that the soil of a road which had been made an set out between the times of making the leases, and was part of th parcels comprised in the first lease, passed by the second: *Doe* v *Osborne* (1840), 4 Jur. 941.

'All that the one equal eighth part or share, or other the part hare, parts or shares, &c.," restricted by the recitals to one th share: *Gray* v. *Earl of Limerick* (1848), 2 De G. & Sm. ; 17 L. J. Ch. 443; 79 R. R. 249.

Conveyance of "all the lands, &c., of A and B, situate in" t parishes (naming them) "and which are intended to be ified and described in the schedule hereunder written, but ch schedule is not intended to abridge or affect the generality e description hereinbefore expressed and contained"; restricted the recitals to the property comprised in the schedule: *Walsh Trevanion* (1850), 15 Q. B. 733; 19 L. J. Q. B. 458; 14 Jur. 4; 81 R. R. 775.

Recital that by virtue of certain deeds, certain specified heredita- ts, "and all other the hereditaments in the county of Y here- ter expressed to be appointed and released," stood limited as lor should appoint, and subject thereto to him in fee; and of agreement for the settlement of the estates in the county of Y, ereinafter mentioned and intended to be hereby conveyed," owed by an appointment and conveyance of the specified editaments mentioned in the recital, and "all other the editaments in the county of Y, of or to which the grantor was ed or entitled for an estate of inheritance." *Held*, that an te in the county of Y, of which the grantor was seised, but ch was not specifically mentioned in the recited deeds or the cels in the conveyance, did not pass: *Jenner* v. *Jenner* (1866), R. 1 Eq. 361.

Private statute.

A private statute recited that it would be greatly for the benefit he tenant for life and remaindermen if certain lands comprised settlement and a previous statute were sold, and enacted that he hereditaments settled by the settlement and previous statute ch were described in the schedule, with the usual "general ds," should be vested in trustees for sale. Certain heredita- ts not comprised in the settlement and previous statute were uded in the schedule. *Held*, that, having regard to the recitals the description in the parcels, such hereditaments did not pass the statute: *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 378; 43 L. J. Ch. 495.

Composition deed.

A composition deed contained a recital of an agreement to assign he property set forth in the schedule, and the debtor assigned he properties, etc., set forth in the schedule and all other the te, if any, of the debtor. *Held*, that the general words were rolled by the recital, and that the debtor's life interest under a -nuptial settlement, which was not included in the schedule, did pass: *Ex p. Dawes* (1886), 17 Q. B. D. 275.

Mines

A conveyance in Scotland "of all and whole the lands" was

held by reference to the recitals not to include the minerals : *O* v. *Mitchell*, [1893] A. C. 238.

Settlement.

Settlement, reciting an agreement that a moiety of all suc property as A B should at any time during the coverture be c become seised or possessed of, or interested in or entitled unt should be settled : A B covenanted that in case any lands shoul at any time during the coverture accrue unto or vest in him upo the death or by the settlement or devise of any person, he shoul convey one moiety to the trustee. *Held*, that land of which A was tenant in tail in remainder subject to the life interest of hi father, but defeasible by his father making an appointment, wa subject to the covenant : *Maclurcan* v. *Lane* (1858), 7 W. R. 135 5 Jur. (N.S.) 56; 32 L. T. (O.S.) 172; 115 R. R. 983.

By a settlement, made in 1826, £20,000 was settled in trust fc a woman for life, with remainder for her children as she shoul appoint, and in default for them equally, the shares of sons to ves at twenty-one, of daughters at twenty-one or marriage; there wer two children, a son and a daughter : the mother appointed £10,00 to the son on his marriage : the settlement made on his marriag in 1850, recited that he was entitled to £10,000, and also entitle to the rest of the fund contingently on the death of his sister unde twenty-one unmarried, subject and without prejudice to the trust of the settlement of 1826, and an agreement to settle the £10,00 and "all other his part, share, and interest, as well vested a contingent" in the trust funds. The son then assigned his interes in the same terms. The daughter attained twenty-one and died and the mother appointed the residue of the funds to her son *Held*, that it did not pass under the settlement : *Childers* v. *Eardle* (1860), 28 Beav. 648; 126 R. R. 279.

Bankruptcy.

See *Re Davies, ex p. Miles*, [1921] 3 K. B. 628; 91 L. J. K. B 81, distinguishing *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch 360; 71 L. J. Ch. 518, cases as to the admissibility of recitals i evidence against the trustee in bankruptcy of a party to the deed.

Covenant to settle.

A covenant for the settlement of the wife's after-acquire property was construed by reference to the recitals in *Re Michell Trusts* (1878), 9 Ch. D. 5; 48 L. J. Ch. 50; *Re De Ros' Trus* (1885), 31 Ch. D. 81; 55 L. J. Ch. 73; and *Re Coghlan*, [1894 3 Ch. 76; 63 L. J. Ch. 671.

Omission of name from operative part.

Where a deed, to which a married woman was a party, an which was acknowledged by her, contained recitals of an agreemen for the sale of lands in which her husband was interested, free fro incumbrances; and that she and her husband had agreed to join i the same for the purposes thereinafter mentioned; but her nam was omitted throughout the operative part and the covenants fc title. *Held*, that her dower was barred, reliance being placed c

fact that if the wife's dower was not bound, she would have cuted a deed in the most solemn manner known to the law and e passed nothing by it : *Dart* v. *Clayton* (1864), 4 N. R. 221; C. *sub nom. Dent* v. *Clayton*, 33 L. J. Ch. 503; 10 Jur. (N.S.) ; 12 W. R. 903; 149 R. R. 814.

A recital contained in a deed is a sufficient declaration to bar ver within section 6 of the Dower Act. See *Re Gibbon, Moore Gibbon*, [1909] 1 Ch. 367, at p. 380; 78 L. J. Ch. 264.

Appointment of new trustees.

Conveyance by retiring, to new, trustee of specific parcels, " and other monies, securities, property, and effects, now vested jointly the retiring and continuing trustee." *Held*, on consideration the recitals, the witnessing part, the state of the property, and de of dealing with it, not to pass leaseholds not specifically ntioned : *Hopkinson* v. *Lusk* (1864), 34 Beav. 215; 10 Jur. (N.S.) .

Power of attorney.

Power of attorney appointing attorneys without in terms limiting duration of their powers, but with recitals that principal was ng abroad, and was desirous of appointing attorneys during his ence. *Held*, to be an appointment of attorneys only during such ence : *Danby* v. *Coutts* (1885), 29 Ch. D. 500; 54 L. J. Ch. 577. As to a misrecital in a power of attorney, see *Hersey* v. *Fox* 28), Littleton's Rep. 143.

" If there is a power of attorney to do a particular act followed general words those general words are not to be extended beyond at is necessary for doing that particular act for which the power attorney is given " : *per* Campbell, L.C., in *Perry* v. *Holl* (1860), De F. & J. 38, at p. 48; 29 L. J. Ch. 677; 128 R. R. 56; 129 R. 9. See also *Attwood* v. *Munnings* (1827), 7 B. & C. 278; . J. (O.S.) K. B. 9; 31 R. R. 194.

Covenants apparently dependent.

Covenants apparently dependent shown by recitals to be ependent : *Lloyd* v. *Lloyd* (1837), 2 My. & Cr. 192; 45 R. R. 25.

Bond.

Bond for the good behaviour of A " so long as he shall continue uty-postmaster," with a recital that he had been appointed for months. *Held*, that the bond was restricted to his behaviour ing the six months : *Lord Arlington* v. *Merricke* (1671), 2 Wms. nd. 411 (p. 813, ed. 1871); 3 Keb. 45 and 59.

The recital of an appointment to an office for twelve months was l sufficient to cut down words in the condition which were wide ugh to include transactions arising after the twelve months had ired : *Liverpool Waterworks Co.* v. *Atkinson* (1805), 6 East, 507. So where the office was in fact an annual office, though not ted to be so, the surety was not bound on subsequent appointts of the same officer : *Wardens of St. Saviour's* v. *Bostock* 06), 2 B. & P. N. R. 175; *Hassell* v. *Long* (1814), 2 M. & S. ; *Peppin* v. *Cooper* (1819), 2 B. & Ald. 431; *Leadley* v. *Evans*

(1824), 2 Bing. 32; 9 J. B. Moore, 102; *Kitson* v. *Julian* (1855) 4 E. & B. 854; 24 L. J. Q. B. 202; 99 R. R. 788; *Mayor o Cambridge* v. *Dennis* (1858), E. B. & E. 660; 27 L. J. Q. B. 474 113 R. R. 819.

So in fidelity bonds, where there was a recital of the nature o the service, the surety was discharged by an alteration in th service, though the words of the condition were wide enough t include the altered service, *e.g.*, by the alteration of remuneratio from commission to a fixed salary : *Bamford* v. *Iles* (1849), 3 Exch 380; 18 L. J. M. C. 49; 77 R. R. 656; or from a fixed salary t commission : *North-Western Ry. Co.* v. *Whinray* (1854), 10 Exch 77; 23 L. J. Ex. 261; 102 R. R. 484; but not where there was mere reduction in salary (it does not appear whether the amoun of the salary was recited in the bond) : *Frank* v. *Edwards* (1852) 8 Exch. 214; 22 L. J. Ex. 42; 91 R. R. 448.

Whether the subsequent promotion to be manager of a branc bank releases sureties under a bond which recited the appoint ment as a clerk and was conditioned for fidelity whilst in th service of the bank, *quaere* : *Anderson* v. *Thornton* (1842), 3 Q. B 271; 2 G. & D. 502.

The extent of the condition in an indemnity bond was restricte to past transactions only by the recitals, though the words of th condition were wide enough to extend to future transactions also *Pearsall* v. *Summersett* (1812), 4 Taunt. 593.

Miscellaneous.

Other instances of the statements in the operative part bein controlled by the recitals are : *Cholmondeley* v. *Clinton* (1817-21) 2 J. & W. 1; 2 Mer. 171; 4 Bligh, 1; 2 B. & Ald. 625; 21 R. R 419 (limitations explained); *Lampon* v. *Corke* (1822), 5 B. & Ald 606; 24 R. R. 488; *S. C. sub nom. Lambourne* v. *Cork*, 1 D. & Ry 211 (receipt qualified, this case was discussed and followed i *Bottrell* v. *Summers* (1828), 2 Y. & J. 407; 31 R. R. 613); *Denison* v. *Holiday* (1857), 1 H. & N. 631; (1858), 3 H. & N. 670; 10 R. R. 754 (parcels restricted); *Re Daniel's Settlement Trust* (1875), 1 Ch. D. 375; 45 L. J. Ch. 105 (where the construction o the usual trusts for children in a settlement in which the trust for daughters were omitted, was aided by a recital of an intentio to provide for "children").

Releases always restricted to matters mentioned in the recitals.

The most striking instance of the generality o the operative words being controlled by the recital occurs in a release.

"If a release is given on a particular consideration recited, not withstanding that the release concludes with general words, yet th law, in order to prevent surprise, will construe it to relate to th

cular matter recited which was under the contemplation of parties, and intended to be released" : *per* Lord Hardwicke, C., *sden* v. *Hylton* (1751), 2 Ves. Sen. 305, at p. 310.

If there be introductory matter, that will qualify the general s of the release" : *per* Best, J., *Lampon* v. *Corke* (*supra*), 611.

The general words of a release are limited always to that thing hose things which were specially in the contemplation of es at the time when the release was given" : *per* Lord West-, *L. & S. W. Ry. Co.* v. *Blackmore* (1870), L. R. 4 H. L. 610, 623. And see Dav. Prec. vol. 5, pt. 2, p. 147 (3rd ed.), and Concise Prec. (20th ed.), p. 381; n. (*f*) to *Fowell* v. *Forrest* 0), 2 Wms. Saund. 47 (p. 141, ed. 1871).

ases in which general words of release have been restricted by als are : *Anon.* (1607), 2 Roll. Ab. 409, A. pl. 3; *Knight* v. (1690-1), 3 Lev. 273; 1 Show. K. B. 150; Carth. 118; *S. C. nom. Cole* v. *Knight*, 3 Mod. 277; Holt, 620; *Thorpe* v. *Thorpe* 3-1701), 1 Ld. Raym. 235, 662; *Butcher* v. *Butcher* (1804), & P. N. R. 113; *Payler* v. *Homersham* (1815), 4 M. & S. 423; . R. 516; *Upton* v. *Upton* (1832), 1 Dowl. 400; 36 R. R. 817; *ns* v. *Johnson* (1832), 3 B. & Ad. 175; 1 L. J. K. B. 95; 37 . 377; *Lindo* v. *Lindo* (1839), 1 Beav. 496; 8 L. J. Ch. 284; . R. 419; *Bain* v. *Cooper* (1842), 9 M. & W. 701; *Major* v. *bury* (1845), 2 D. & L. 763; 14 L. J. Q. B. 118; *Anon.* (1862), eav. 310; *London and South Western Ry. Co.* v. *Blackmore* 0), L. R. 4 H. L. 610; 39 L. J. Ch. 713 (the recitals are set n the report of the case in the Court below, 38 L. J. Ch. 19); *er* v. *Turner* (1880), 14 Ch. D. 829.

Releases without recitals.

the following cases the general words in the release were d to the matters which the parties had in contemplation, h they were not mentioned in the recitals : *Henn* v. *Hanson*), 1 Lev. 99; 1 Sidf. 141; *Stoke* v. *Stokes* (1669), 1 Lev. 2 Keb. 530; *S. C. sub nom. Nokes* v. ——, 1 Vent. 35; s v. *Wilford* (1677-9), 2 Lev. 214 (where the marginal note rs to be incorrect); 3 Keb. 814, 840; 2 Show. 46; Sir T. , 104; *Farewell* v. *Coker* (1725-9), 2 Ja. & W. 192; stated by , M.R, in *Cholmondeley* v. *Clinton* (1817), 2 Mer. 171, at 53; *Lyall* v. *Edwards* (1861), 6 H. & N. 337; 30 Ex. 193; 123 R. R. 547; *Turner* v. *Turner* (1880), 14 . 829.

Deeds of compromise.

It is not in accordance with principle or authority to construe of compromise of ascertained specific questions so as to e any party thereto of any right not then in dispute and contemplation of any of the parties to such deed" : *per* ll, L.J., in *Cloutte* v. *Storey*, [1911] 1 Ch. 18, at p. 34; 80

L. J. Ch. 193. See also *Bennett* v. *Merriman* (1843), 6 B. 36
63 R. R. 110; *Lawton* v. *Campion* (1854), 18 B. 87; 23 L. J. C
503; 104 R. R. 378.

Recital of objections to the title.

It appears that if, for the purpose of obviating objections to title, a person joins in the conveyance, which recites specifi objections, he is not bound, except as to the interest appearing the objections to be vested in him; but that, if the recital generally that there are objections to the title, without stating wh they are, it must be taken that he has inquired into the nature such objections, and he cannot afterwards raise any question as the extent of his information, so that every interest that he has bound: *Lord Braybroke* v. *Inskip* (1803), 8 Ves. 417; 7 R. R. 10 cited and followed by Sir Wm. Grant, M.R., in *Cholmondeley* *Clinton* (1817), 2 Mer. 171, at p. 355; Dart, V. & P. c. 11, s. p. 550 (7th ed.).

Misrecitals are immaterial.

A misrecital will not affect the deed, if it b sufficiently clear what is intended.

Misrecital of lease,

A misrecital of a lease in a grant of the reversion does n invalidate the grant: *Withes* v. *Casson* (1614), Hob. 128; *Foo* v. *Berkly* (1668-70), 2 Keb. 322, 480, 611, 654; 1 Lev. 23 1 Vent. 83.

of fine,

Grant of a manor held good, though in reciting a fine whi formed part of the title, the names of the plaintiffs and deforcian were transposed, "for there is sufficient certainty of the thi granted, and of the intention of the parties to grant it," the rest the description of the fine being correct: *Moody* v. *Lewen* (159 Cro. Eliz. 127; *S. C.* more fully reported *sub nom. Lewen a Mody's Case*, 3 Leon. 135.

in grant of reversionary lease.

Where, on the grant of a reversionary lease, an existing lease A is recited, and the date is incorrectly stated, it appears that, the habendum is made from and after "the *said* lease," or "t expiration, surrender, or forfeiture of the *said* lease," the ter commences immediately; but, if the habendum is "from and aft the lease to A" or "after A's interest determined," the term co mences on the expiration of A's lease: see Co. Litt. 46 b, note 1 *Mount* v. *Hodgkin* (1555), Dy. 116 a; 1 And. 3; Benl. & Dal. 3 Bendl. 35; *Foote* v. *Berkly* (1668-70), 1 Lev. 234; 1 Vent. 8 2 Keb. 322, 480, 611, 654; and see Platt on Leases, vol. pp. 63, 69, and cases there cited; Shep. Touch. 77. The reas apparently is, that in the former case the term is made to commen on the determination of a term which does not exist, in the latt case on the determination of a term which, though not describ by the deed, can be ascertained by extrinsic evidence. If t existing lease to A is void, the term commences immediately

Leases, 62; *Anon.* (1576), 2 Leon. 11; *Miller* v. *Mainwaring* 4), W. Jo. 354; Cro. Car. 397.

Misrecitals cannot be corrected by reference to the recited docu- : *Lainson* v. *Tremere* (1834), 1 Ad. & E. 792; 3 L. J. K. B. 40 R. R. 426, where in an action on a bond conditioned for recited to be of a certain amount, defendant was not allowed ead that, by the indenture referred to in the bond, a less rent reserved which had been paid; *Re Carter's Trusts* (1869), R. 3 Eq. 495.

Misrecitals cannot be corrected.

man cannot be required to execute a deed containing incorrect als: *per* Cairns, L.C., in *Hartley* v. *Burton* (1868), L. R. . 365.

Man not to be required to execute deed containing misrecitals.

A misrecital may influence the construction.

Misrecital influencing construction.

Where the words of a recovery deed were in themselves sufficient ave passed an advowson appendant to a manor, yet, as it ared from an erroneous recital that the parties believed it not e appendant, it was held not to pass: *Moseley* v. *Motteux* 2), 10 M. & W. 533.

A misrecital may operate by way of estoppel.

Misrecital may operate by estoppel

his is contrary to the old doctrine, Co. Litt. 352 b, but is now d law: 2 Sm. L. C. (12th ed.) 857 *et seq.*, notes to *Doe* v. r, *The Duchess of Kingston's Case*, and *Trevivan* v. *Lawrence*; *Hill* v. *Manchester Waterworks* (1831), 2 B. & Ad. 544; J. K. B. 230; 36 R. R. 656; *Lainson* v. *Tremere* (*supra*); *nan* v. *Taylor* (1834), 2 Ad. & E. 278; 4 Nev. & M. 264; J. K. B. 58; 41 R. R. 437; *Bowman* v. *Rostron* (1835), 2 Ad. 295, subject to the following qualifications and remarks:—

) "That every estoppell, because it concludeth a man to ge the truth, must be certaine to every intent, and not to ken by argument or inference."

Recital must be precise, not general.

Every estoppell ought to be a precise affirmation of that which h the estoppell": Co. Litt. 352 b. See also Sugd. V. & P. ed.) 739, n.; 1 Dav. Conv. (5th ed.), p. 51; Dart, V. & P. d.), c. 13, s. 8, pp. 820, 821; 2 Sm. L. C. (12th ed.), p. 860; to *Doe* v. *Oliver, The Duchess of Kingston's Case* and *van* v. *Lawrence;* Bigelow on Estoppel (2nd ed.), c. 10, 6 *et seq.*; *Salter* v. *Kidley* (1689), 1 Show. K. B. 58. "A l recital will not operate as an estoppel, but the recital of a ular fact will have that effect": *per* Lyndhurst, L.C., *y* v. *Burdon* (1830), 8 L. J. (o.s.) Ch. 85, at p. 87; 25 R. R. The recital must not be general in its terms, for "it is a rule n estoppel should be certain to every intent": *per* Lord

Tenterden, C.J., *Right* v. *Bucknell* (1831), 2 B. & Ad. 278, p. 281; 9 L. J. (o.s.) K. B. 304; 36 R. R. 563. It must be " distinct statement of a particular fact " : *per* Parke, B., *Carpent* v. *Buller* (1841), 8 M. & W. 209, at p. 212; 10 L. J. Ex. 39 58 R. R. 680. There must be " a distinct averment of the grantor title " : *per* Wood, V.-C., *Crofts* v. *Middleton* (1855), 2 K. & 194, at p. 204; 110 R. R. 170. " It may be that when a de contains a recital of a particular fact in express terms, the effe of the recital cannot be got rid of by showing what the intenti of the parties was. But when the language is general we m collect the intention from the terms of the whole deed " : *p* Channell, B., *South Eastern Ry. Co.* v. *Warton* (1861), 6 H. & 520, at p. 528; 31 L. J. Ex. 515; 123 R. R. 659. The recital mu be " precise and unambiguous " : *per* Cairns, L.C., *Heath* *Crealock* (1874), L. R. 10 Ch. 22, at p. 30; 44 L. J. Ch. 157.

" There is not in this case that precise, clear, and unambiguo statement that Downs was seised in fee or had the legal esta which is required by the law "; and " it does not appear to me be at all clear that that would amount to that precise averment a fact which is necessary to support the doctrine that a subseque conveyance of the legal estate will, so to say, fill up the estopp previously created " : *per* Jessel, M.R., *General Finance, etc. C* v. *Liberator Society* (1878), 10 Ch. D. 15, at p. 23; and see *Onwa Building Society* v. *Smithson*, [1893] 1 Ch. 1; 62 L. J. Ch. 13 *Lovett* v. *Lovett*, [1898] 1 Ch. 82; 67 L. J. Ch. 20; and *Maddy's Estate*, [1901] 2 Ch. 820; 71 L. J. Ch. 18.

" Entitled."

" It is said that the word ' entitled ' is ambiguous, and th therefore the recital is not so plain and unambiguous as to exclu the right of the mortgagees to take possession of the mortgag premises and to exercise the right of way. I do not know wh other word could have been used in regard to a right of way. . . ' Entitled ' is the proper expression. It seems to me that the recit is clear " : *per* Buckley, L.J., *Poulton* v. *Moore*, [1915] 1 K. 400, at p. 413; 84 L. J. K. B. 462.

Recital must be of material fact.

(2) The recital must be of a material fact : see *per* Parke, B *Carpenter* v. *Buller* (*supra*), at p. 213; *Anon.* (1576), 2 Leon. 1 Co. Litt. 352 b, 4th rule.

Where the interest, whatever it might be, of a person in certa lands was conveyed to the grantee, " an erroneous recital of h earlier title does not preclude the grantee from showing wh interest really passed by her grant " : *Trinidad Asphalte Compa* v. *Coryat*, [1896] A. C. 587, at p. 593; 65 L. J. P. C. 100.

Estoppel only in action on the deed.

(3) " If a distinct statement of a particular fact is made in t recital of a bond, or other instrument under seal, and a contra is made with reference to that recital, it is unquestionably true th

etween the parties to that instrument and in an action upon it, not competent for the party bound to deny the recital. . . . there is no authority to show that a party to the instrument d be estopped, in an action by the other party, not founded on deed, and wholly collateral to it, to dispute the facts so itted, though the recitals would certainly be evidence" : *per* e, B., *Carpenter* v. *Buller* (1841), 8 M. & W. 209, at pp. 212, 10 L. J. Ex. 393; 58 R. R. 680.

An estoppel is always in some action or proceeding based on deed in which the fact in question is recited. In a collateral n there can be no estoppel" : *per* Wood, V.-C., *Carter* v. er (1857), 3 K. & J. 617, at p. 645; 27 L. J. Ch. 74; 112 R. R. and see 2 Sm. L. C. (12th ed.), at p. 862; *Bittlestone* v. *Cooke* 6), 6 E. & B. 296; 25 L. J. Q. B. 281; 106 R. R. 606; *South-ern Ry. Co.* v. *Warton* (1861), 6 H. & N. 520, *per* Martin, B., . 527; *Fraser* v. *Pendlebury* (1861), 31 L. J. C. P. 1; 10 R. 104; 136 R. R. 857; *Ex p. Morgan* (1876), 2 Ch. D. 72; . J. Bk. 76.

Recitals are not general representations.

Recitals in a deed are not representations of fact, on the faith of h a stranger to the deed is entitled to act without inquiry : *idad Asphalte Company* v. *Coryat*, [1896] A. C. 587; 65 L. J. . 100. But in *Billson* v. *Crofts* (1873), L. R. 15 Eq. 314; 42 . Ch. 531, where A, being entitled to a life interest determin-on insolvency, executed a composition deed which recited that as then insolvent; this was held to estop him as plaintiff in a for a declaration that he had not forfeited his life interest by uting the deed.

Mistake prevents estoppel in equity.

4) In equity a mistake of fact may be proved so as to prevent pel by recital : *Scholefield* v. *Lockwood* (1863), 33 L. J. Ch. 4 De J. & S. 22; 146 R. R. 204; *Brooke* v. *Haymes* (1868), . 6 Eq. 25; *Empson's Case* (1870), L. R. 9 Eq. 597.

Estoppel, how limited as to parties.

5) It is a question of construction on the whole deed whether anguage of a recital is to be taken as that of all parties or of or one of them only, and the estoppel limited accordingly.

When a recital is intended to be a statement which all the es to the deed have mutually agreed to admit as true, it is toppel upon all. But when it is intended to be the statement e party only, the estoppel is confined to that party, and the tion is to be gathered from construing the instrument. All the were brought forward and considered in *Young* v. *Raincock* 9), 7 C. B. 310; 18 L. J. C. P. 73; 78 R. R. 652), and we no doubt that the result of them is as above stated" : *per* son, J., *Stroughill* v. *Buck* (1850), 14 Q. B. 781, at p. 787; J. Q. B. 209, at p. 216; 80 R. R. 395. The real intention object of the admissions must be looked to : *South-Eastern*

Ry. Co. v. *Warton* (1861), 6 H. & N. 520; 31 L. J. Ex. 515; 12 R. R. 659.

A bond recited that A was seised in tail of an estate and ha covenanted to suffer a recovery to the use of D in fee, and th condition was that the bond should be void if the recovery shoul be suffered so that the estate should be vested in D for ever. Th recovery was suffered, but as A had a life estate only, D brough an action on the bond against one of the sureties. *Held*, that I was not estopped by the recital from alleging that A had only a estate for life: *Edwards* v. *Brown* (1829-31), 3 Y. & J. 423; Cr. & J. 307; 9 L. J. (o.s.) Ex. 84; 35 R. R. 720.

Estoppel when negatived by deed itself.

(6) Generally there is no estoppel if the allegation sought to b set up by estoppel is negatived on the face of the instrument itself see Co. Litt. 352 b (8th rule), and 1 Dav. Conv. p. 51 (5th ed.) "Nor shall a man be estopped where the truth appears by the sam instrument": *per* Lord Tenterden, C.J., *Right* v. *Bucknell* (1831) 2 B. & Ad. 278, at p. 281; 9 L. J. (o.s.) K. B. 304; 36 R. R. 563 *Doe* v. *Scarborough* (1835), 4 Nev. & M. 724; 3 Ad. & E. 2; 4 L. J K. B. 172; 42 R. R. 293. But this doctrine does not apply t cases in which, as in *Morton* v. *Woods* (1868), L. R. 3 Q. B. 658 L. R. 4 Q. B. 293; 38 L. J. Q. B. 81, the existence of the relatio of landlord and tenant is in question. "If any of the decision or *dicta* were to lead to the conclusion that where the truth appear there can be no estoppel, that doctrine must be taken to b overruled by the case of *Jolly* v. *Arbuthnot* ((1859), 4 De G. & J 224; 28 L. J. Ch. 547; 124 R. R. 222)": *per* Kelly, C.B., *ibid* at p. 303.

Estoppel against married woman.

(7) *Semble*, there may be estoppel against a married woman *Jones* v. *Frost* (1872), L. R. 7 Ch. 773; 42 L. J. Ch. 47, but sh cannot by estoppel avoid a restraint on anticipation: *Lad Bateman* v. *Faber*, [1898] 1 Ch. 144; 67 L. J. Ch. 130. But, she declines a gift to her of personal estate for her separate us with a restraint on anticipation, the *dictum* of Lindley, M.R., i *Lady Bateman* v. *Faber* (*supra*, at p. 149) is inapplicable: *R Wimperis, Wicken* v. *Wilson*, [1914] 1 Ch. 502; 83 L. J. Ch. 511.

Recitals in former deeds.

(8) A party to a deed of conveyance is not estopped by recita contained in other deeds through which the title so conveyed derived: *Doe* v. *Shelton* (1835), 4 N. & M. 857; 3 Ad. & El. 26 In that case there was a conveyance of lands to A, reciting th bankruptcy of B. The deed was not executed by A. A afterward executed a settlement of the lands. Lord Denman, C.J., said "Is it true as a general proposition that a party so claiming adop the statement of facts in an anterior deed which goes to make u his title? We are aware of no authority for such a doctrine" 4 N. & M., at p. 867; 3 Ad. & El., at p. 283.

n the other hand, in *Doe* v. *Stone* (1846), 3 C. B. 196; L. J. C. P. 234; 71 R. R. 311, a purchaser was held bound by ital that estopped his vendor.

n *Melbourne Banking Corporation* v. *Brougham* (1882), 7 Ap. 307; 51 L. J. P. C. 65, the official assignee in insolvency of ecuted a release to mortgagees of the equity of redemption of state mortgaged by B. B afterwards purchased from the nee all the estate vested in him under the insolvency, and instituted a suit to set aside the release on the ground of epresentation or mistake as to facts therein recited. It was that the onus was upon B, who was *prima facie* bound by admissions under seal of his vendor, to prove the falsehood ne representations.

9) A party to a deed can obtain the benefit of an estoppel, gh he did not execute it: *Hungerford* v. *Becher* (1855), 5 Ch. R. 417. Person not executing deed.

10) Jessel, M.R., expressed a disinclination to extend the rine of estoppel by deed: *Gen. Finance, etc. Co.* v. *Liberator, Society* (1878), 10 Ch. D. 15, at p. 24. Doctrine not to be extended.

A recital in a deed may operate as a covenant, where it appears to have been the intention of the parties that it should so operate. Recital may create covenant.

The authorities in support of this proposition are *Hollis* v. *Carr* 6), Freem. Ch. 3; 2 Mod. 86; *S. C. sub nom. Holles* v. *Carr*, vanst. 638, at p. 648; *Iven* v. *Elwes* (1854), 3 Drew. 25; *Lay Iottram* (1865), 19 C. B. (N.S.) 479; 147 R. R. 670; *Mackenzie hilders* (1889), 43 Ch. D. 265; 59 L. J. Ch. 188; *Buckland* v. *kland*, [1900] 2 Ch. 534; 69 L. J. Ch. 648.

An action may be maintained upon such implied covenant: *oun* v. *Houstoun* (1824), 1 Bing. 433; 2 L. J. (O.S.) C. P. 93; R. R. 665; *Sampson* v. *Easterby* (1829-30), 9 B. & C. 505; in , 6 Bing. 644; 1 C. & J. 105; 33 R. R. 239; *Farrall* v. *Hilditch* 9), 5 C. B. (N.S.) 840; 28 L. J. C. P. 221; 116 R. R. 900.

But "the recital of an agreement does not create a covenant e there is an express covenant to be found in the witnessing relating to the same subject-matter": *per* Jessel, M.R., *Dawes redwell*, 18 Ch. D. 354, at p. 359. But not where covenant in deed.

The admission of a debt, as a general rule, by an instrument r seal would amount to a covenant to pay it, and the question whether it had that effect in this deed. If it was a general unqualified admission, that was the effect of it; but if the t was to acknowledge that debt merely as the ground of giving ity of a particular character for it, then it was not the creation Admission of a debt is a covenant to pay.

of a personal liability to pay, but was only introduced with th object of giving security" : *Per* Malins, V.-C., *Jackson* v. *N. E Ry. Co.* (1877), 7 Ch. D. 573, at p. 583; 47 L. J. Ch. 303, discussin *Courtney* v. *Taylor* (1843), 7 Sc. N. R. 749; 6 Man. & G. 851 12 L. J. C. P. 330; 64 R. R. 872, and other authorities. See als *Iven* v. *Elwes* (1854), 3 Drew. 25; *S. C. sub nom. Ivens* v. *Elwes* 24 L. J. Ch. 249; 1 Jur. (N.S.) 6.

Power exercised by recital.

A recital in an instrument, capable of operating as the executio of a power may amount to an execution of the power : *Poulson* v *Wellington* (1729), 2 P. Wms. 533; *Wilson* v. *Piggott* (1794), Ves. Jr. 351, see p. 355; 2 R. R. 246, and see *Re Horsfall Hudleston* v. *Crofton*, [1911] 2 Ch. 63; 80 L. J. Ch. 480; *R Sugden, Sugden* v. *Walker*, [1917] 2 Ch. 92; 86 L. J. Ch. 447 *Re Farnell's S. E.* (1886), 33 Ch. D. 599; even if the recital i only of a past transaction which by itself would not have been sufficient execution of the power : *Lees* v. *Lees* (1871), Ir. R. 5 Eq 549.

How far recital binding.

As to the extent to which a person is bound by recitals, se *Re Sugden* (*supra*), [1917] 2 Ch., at p. 98.

Recital only evidence of what is recited.

The recital of a former deed proves only so much of it as i stated in the recital : *Gillett* v. *Abbott* (1838), 7 A. & E. 783 3 N. & P. 24; 1 W. W. & H. 91; 2 Jur. 300.

Miscellaneous.

Voluntary settlement of (*inter alia*) a sum of £2,000 which wa therein recited to have been paid to the trustee. The £2,000 ha not in fact been paid, but the trustee executed the settlement o the faith of a promise by the settlor to pay it. *Held*, that neithe the trustee of the settlement nor a volunteer under it could enforc payment : *Marler* v. *Tommas* (1873), L. R. 17 Eq. 8; 43 L. J Ch. 73.

As to the effect of an ambiguous recital in connection with th doctrine of constructive notice, see *Kenny* v. *Browne* (1796). Ridgway, 462, at p. 512; Dart (7th ed.), c. 14, s. 5, p. 895; as t a recital relieving a purchaser from ascertaining whether debts an legacies charged on the land had been paid, see *Storry* v. *Wals* (1854), 18 Beav. 559; and as to a recital that the transferees of mortgage were then entitled to the mortgage money, relieving purchaser from inquiry how they became so entitled, see *R Harman and Uxbridge and Rickmansworth Railway Co.* (1883), 2 Ch. D. 720; 52 L. J. Ch. 808.

And as to a recital that one of the parties to a partition dee was seised of the freeholds as trustee partly for himself and part for the other party to the deed, and disentitling the purchas from inquiring how the trust was created, see *Re Chafer an Randall's Contract*, [1916] 2 Ch. 8; 85 L. J. Ch. 435, explaining an distinguishing *Malpas* v. *Ackland* (1827), 3 Russ. 273.

Notice of trust.

"I do not entertain any doubt that a recital that an owner of legal estate is trustee for A B under a will, or under a deed, cts a purchaser with notice of the contents of the deed or of will. But that doctrine has no bearing upon a case where e is nothing more than a statement that he holds upon trust A B. Such a statement is an admission against interest by the er of the legal estate": *per* Cozens-Hardy, M.R., in *Chafer Randall's Contract* (*supra*), at p. 18; and see Sargant, J.'s, arks in the same case.

CHAPTER XII.

CONSIDERATION—RECEIPT.

Illegal Consideration: Consideration may be proved: Post-nuptial Settlements of Wife's Property: Voluntary Assignments of Leaseholds: Consideration stated to have been paid by A may be proved to have been paid by B: Consideration necessary to raise Use: Receipt in Deed conclusive at Law prior to 1875: But not in Equity: Since 1875 not conclusive: Indorsed Receipt: Reliance on Receipt.

ALL the parts of a deed before the habendum are technically known as "the premises": Shep. Touch. p. 74; and in that part which follows after the recitals, if any, are usually contained the statement of the consideration and the receipt therefor.

If consideration illegal deed not enforceable,

If the consideration, or part of the consideration, for a deed is illegal the deed cannot be enforced.

The principal authorities for this proposition are *Featherston* v. *Hutchinson* (1590), 1 Cro. Eliz. 199; *Waite* v. *Jones* (1835), 1 Bing. N. C. 656, at p. 662, *per* Tindal, C.J.; *Shackell* v. *Rosier* (1836), 2 Bing. N. C. 634; 5 L. J. C. P. 193; 42 R. R. 666; *Lound* v. *Grimwade* (1888), 39 Ch. D. 605; 57 L. J. Ch. 725; *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587; 60 L. J. Ch. 564; [1892] 1 Ch. 173; 61 L. J. Ch. 138. See also *Binnington* v. *Wallis* (1821), 4 B. & Ald. 650. But, although many statements to the effect than an illegal consideration avoids a deed will be found, a deed for an illegal, or partly illegal, consideration is not void in the sense that it is inoperative to pass the estate, though it may in certain circumstances be set aside and a reconveyance ordered: *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200; 35 L. J. Ch. 717; 148 R. R. 396; *Jones* v. *Merionethshire Permanent Benefit Building Society* (*supra*).

but deed is not void.

If consideration a nullity deed enforceable.

There is a distinction between a consideration which is illegal and one which is merely a nullity, for where a deed is made for a consideration, partly good and partly a nullity, the deed may be enforced: *Crisp* v. *Gamel* (1606), Cro. Jac. 128; *Newman* v. *Newman* (1815), 4 M. & S. 66; 16 R. R. 386.

If the consideration is stated inaccurately, or is not stated at all, or if part only of the consideration is stated, evidence is admissible to prove the true consideration, so as it be not inconsistent with the consideration stated in the deed.

Proof of consideration not expressed in deed is admissible.

'An averment shall not be allowed and taken against a deed, ; there was no consideration given, when there is an express sideration upon the deed, yet when the deed expresseth no sideration or saith 'for divers good considerations,' or the like, e an averment of a good consideration given shall be received, this is an averment that may stand with the deed": Shep. ch. 510, and see 1 Dav. Prec. (5th ed.) 53.

"A use cannot be raised by any covenant or proviso or by gain and sale, upon a general consideration; and therefore if a by deed indented, and inrolled according to the statute, for ers good considerations, bargains and sells his lands to another his heirs, *nihil operatur inde*, for no use shall be raised upon general consideration, for it doth not appear to the Court t the bargainer hath *Quid pro quo*, and the Court ought to judge ther the consideration be sufficient or not; and that cannot be n it is alleged in such generality. But note, reader, the gainee in such a case may aver that money or other valuable sideration was paid or given; and if the truth be such, the gain and sale shall be good. So, if I by deed covenant with , for divers good considerations, that I and my heirs will stand ed to the use of him and his heirs, no use, without a special rment, shall be raised by it; but if J S be of my blood, and ruth the covenant was made for the advancement of his blood, may aver that the covenant was in consideration thereof": *lmay's Case* (1584), 1 Rep. 174 b, at p. 176 a.

Bargain and sale

Covenant to stand seised.

'That considerations, not recited in a deed, may be resorted to, upport it, is well settled provided they be not inconsistent with t appears upon the face of the deed": *per* Plunket, L.C., *Nixon Iamilton* (1838), 2 Dr. & Wal. 364, at p. 385; 56 R. R. 246.

'The rule is that where there is one consideration stated in the l, you may prove any other consideration, which existed, not in radiction to the instrument, and it is not in contradiction to instrument to prove a larger consideration than that which is ed": *per* Knight-Bruce, V.-C., *Clifford* v. *Turrell* (1841), . & C. C. C. 138, at p. 149.

'The settled rule of law is that you may go out of the deed rove a consideration that stands well with that stated on the of the deed, but you cannot be allowed to prove a consideration nsistent with it": *per* Lord Lyndhurst, C., *Clifford* v. *Turrell*

(1845), 9 Jur. 633; 14 L. J. Ch. 390; 57 R. R. 275 (where the authorities are discussed), and see *Frith* v. *Frith*, [1906] A. C. 254; 75 L. J. P. C. 50.

"There is no doubt that evidence is admissible to show that there was consideration for the deed not appearing upon the face of it": *per* Turner, L.J., *Townend* v. *Toker* (1866), L. R. 1 Ch. 466, at p. 459; 35 L. J. Ch. 608; 148 R. R. 372.

"As a general rule, evidence may be given to show that a deed in form voluntary was in truth for valuable consideration": *per* Cozens-Hardy, L.J., *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, at p. 388; 71 L. J. Ch. 518; distinguished *Re Davies, ex p. Miles*, [1921] 3 K. B. 628; 91 L. J. K. B. 81 (as to effect of recital in deed), and see generally Key & Elphinstone (12th ed.), Vol II, Pt. II, p. 632.

Old rule was that if one consideration stated no other could be proved,

It used to be doubted whether, if one consideration appeared on the face of the deed without the words "and divers other considerations," or the like, additional or other consideration could be proved. Lord Hardwicke said: "Where any consideration is mentioned, as of love and affection only, if it is not said also *and for other considerations*, you cannot enter into proof of any other: the reason is because it would be contrary to the deed: for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other": *Peacock* v. *Monk* (1748), 1 Ves. Sen. 127, at p. 128. But this *dictum* cannot now be relied upon: see *Stiles* v. *Att.-Gen.* (1740), 2 Atk. 152; *Leifchild's Case* (1865), L. R. 1 Eq. 231; 147 R. R. 853; *Townend* v. *Toker* (*supra*); *Llanelly Ry. Co.* v. *London and North Western Ry. Co.* (1873), L. R. 8 Ch. 942; 42 L. J. Ch. 884; affirmed (1875), L. R. 7 H. L. 550.

but is now overruled.

Valuable consideration not expressed proved.

Where the consideration stated in the deed was neither valuable nor good, evidence was admitted to prove valuable consideration: *Stiles* v. *Att.-Gen.* (1740), 2 Atk. 152.

Evidence was admitted to prove valuable consideration, where a nominal consideration alone was expressed: *Leifchild's Case* (*supra*), and where a nominal consideration "and divers other good causes and considerations" were expressed: *Chapman* v. *Emery* (1775), 1 Cowp. 278.

Where the consideration expressed in the conveyance was "five shillings and other valuable considerations" the Court was not bound to hold it, at all events, to be for a valuable consideration but could at most only let the defendant into proof that there were other valuable considerations: *Walker* v. *Burrows* (1745) 1 Atk. 93.

Where a settlement was expressed to be made in consideration of natural love and affection and of a covenant and for a nominal

ideration, it was held, first, that the covenant was a valuable ideration, and secondly, that evidence was admissible which ved other valuable consideration: *Townend* v. *Toker* (*supra*). See further as to what constitutes a valuable consideration es to *Barber* v. *Fox*, 2 Will. Saunders, pp. 418 *et seq.*; liams' Bankruptcy (13th ed.), pp. 302, 306.

Bargain and sale.

Evidence may be admitted to show that a bargain and sale in ch no consideration of money is expressed was made for such a sideration: *Fisher* v. *Smith* (1599), Moore, 569; *Negus* v. *nal* (1661), 1 Keble, 12.

Where no consideration was stated, evidence was admitted to ve, in *Ferrars* v. *Cherry* (1700), 2 Vern. 383, that a settlement le after marriage was really made in pursuance of marriage cles, though this was not stated in the settlement; in *Peacock Monk* (1748), 1 Ves. Sen. 127, services done by the donee to the or; and in *Llanelly Ry. Co.* v. *London and North Western Ry.* (*supra*) a pecuniary consideration.

Additional consideration proved.

Where the deed was stated to be for valuable consideration, of was admitted in *Villars* v. *Beamont* (1555—6), Benl. & Dal. Dy. 146 a, pl. 68, cited at length 1 Rep. 176 a, that a deed arently made for pecuniary consideration was also made in sideration of marriage; in *Vernon's Case* (1573), 4 Rep. 1; er, 317 a, that a conveyance to a wife on express condition to form her husband's will was also for her jointure; and in *R.* v. *mmonden* (1789), 3 T. R. 474, and *Clifford* v. *Turrell* (1841), . & C. C. C. 138; 57 R. R. 275; on app. (1845), 14 L. J. Ch. ; 9 Jur. 633, that the pecuniary consideration was larger n that stated in the deed. See also *Re Barnstaple Second uitant Society* (1884), 50 L. T. 425.

Where the consideration stated in the deed was £150 paid and acceptance for £300. *Held* that the vendor might show that he stipulated for a lien for the £300: *Frail* v. *Ellis* (1852), 16 v. 350; 22 L. J. Ch. 467; 96 R. R. 168; *Frith* v. *Frith*, 06] A. C. 254; 75 L. J. P. C. 50.

Where natural love and affection only stated.

Where the consideration was stated to be natural love and ction, evidence was admitted to prove, in *Attwell* v. *Harris* 19), 2 Roll. Rep. 91, payment of money; in *Tarner* v. *Byne* 27), 1 Sim. 160, the consideration of marriage; in *Leahy* v. *cer* (1828), 1 Moll. 313, the execution of several contemaneous money bonds; and in *Gale* v. *Williamson* (1841), 8 M. & 405; 10 L. J. Ex. 446; 58 R. R. 749, and *Harman* v. *Richards* 52), 10 Ha. 81; 22 L. J. Ch. 1066; 90 R. R. 297, a simultaneous l forming part of the same transaction.

Where the consideration was stated to be natural love and ction "and divers other good causes and considerations,"

evidence was admitted to prove, in *Pott* v. *Todhunter* (1845), 2 Coll. 76, a state of things amounting to valuable consideration; in *Thompson* v. *Webster* (1852), 4 Drew. 628; (1859), 4 De G. & J. 600; in Dom. Proc. (1861), 7 Jur. (N.S.) 531, a family arrangement, which amounted to valuable consideration; and in *Bayspoole* v. *Collins* (1871), L. R. 6 Ch. 228; 40 L. J. Ch. 289, a pecuniary consideration.

Where valuable consideration is expressed, natural love, etc., cannot be proved.

Where a deed is expressed to be made for valuable consideration, evidence of natural love and affection would apparently not be admissible, for if it were, no deed made between relations could ever be upset on the ground of inadequacy of consideration: *Bedell's Case* (1607), 7 Rep. 40 a, at p. 40 b; *Foster* v. *Foster* (1663), Thos. Raym. 43; 1 Lev. 55; 1 Sidf. 82; 1 Keble, 160, 225, 274 and 319; *Clarkson* v. *Hanway* (1723), 2 P. Wms. 203; *Willan* v. *Willan* (1814), 2 Dow, 274, *per* Lord Redesdale, at p. 282. And when fraud is alleged it would seem that a deed expressed to be for valuable consideration cannot be supported, by the averment of the consideration of affection between relatives, or as a gift between strangers: *Bridgman* v. *Green* (1755), 2 Ves. Sen. 627, *per* Hardwicke, L.C., at p. 628; *Watt* v. *Grove* (1805), 2 Sch. & Lef. 492, *per* Lord Redesdale, C., at p. 501; *Willan* v. *Willan* (*supra*).

In *Filmer* v. *Gott* (1774), 4 Br. P. C. 230, evidence was admitted to prove that the consideration of natural love, etc., stated in the deed did not exist, notwithstanding that the parties were relations.

Post-nuptial settlements.

A post-nuptial settlement is not voluntary if there is sufficient evidence to satisfy the Statute of Frauds of an ante-nuptial agreement made for a good consideration before in consideration of marriage, and this may appear from a recital in the post-nuptial settlement.

In connection with this subject it may be observed that a post-nuptial settlement of the wife's land (not limited to her separate use: *Shurmur* v. *Sedgwick* (1883), 24 Ch. D. 597; 53 L. J. Ch. 87), whereby the interests of the husband and wife are modified, was not, prior to the Married Women's Property Act, 1882, voluntary: *Hewison* v. *Negus* (1853), 16 Beav. 594; 22 L. J. Ch. 655; 96 R. R. 274; *Atkinson* v. *Smith* (1858), 3 De G. & J. 186; 28 L. J. Ch. 2; 121 R. R. 65; *Teasdale* v. *Braithwaite* (1876), 4 Ch. D. 85; (1877), 5 Ch. D. 630; 46 L. J. Ch. 725; *Re Foster and Lister* (1877), 6 Ch. D. 87; 46 L. J. Ch. 480 (in which case *Goodright* v. *Moses* (1775), 2 W. Bl. 1019, *Currie* v. *Nind* (1835), 1 My. & Cr. 17, and *Butterfield* v. *Heath* (1852), 15 Beav. 408; 22 L. J. Ch. 270; 92 R. R. 484, were disapproved).

Conveyances of leaseholds.

It may also be observed that a conveyance, in form voluntary, of leaseholds is necessarily a conveyance for value within 27 Eliz. (1585), c. 4, owing to the liability on the part of the assignee to

the rent and perform the covenants of the lease: *Price* v. *kins* (1877), 5 Ch. D. 619; 46 L. J. Ch. 805; *Ex p. Doble* 78), 26 W. R. 407 (*Lee* v. *Matthews* (1880), 6 L. R. Ir. 530, is *tra*); but is not within the exception in the Bankruptcy Act of), s. 91 (or the Act of 1914, s. 42): *Ex p. Hillman* (1878), 10 D. 622; 48 L. J. Bk. 77; and is not a conveyance for value nin 13 Eliz. (1571), c. 5 (*a*) (made perpetual by 29 Eliz. 37), c. 5): *Re Ridler* (1882), 22 Ch. D. 74; 52 L. J. Ch. 343; is regarded as being for value, so as to prevail against an ity of which the assignee had no notice: *Harris* v. *Tubb* (1889), Ch. D. 79; 58 L. J. Ch. 434.

Grants for life or in tail of freeholds.

Although if a man make a conveyance in fee simple without sideration there is a resulting use to him, still if he make a veyance, without stating any consideration, for life or in tail use results to him during the estate for life or in tail, as the ancy created is a sufficient consideration: Shep. Touch. 522; . Uses, 188.

Bill of sale.

A bill of sale is avoided in respect of the personal chattels prised therein if the consideration for which it is given is not y set forth: 45 & 46 Vict. (1882), c. 43, s. 8.

Antecedent debt.

The existence of an antecedent debt is not good consideration a voluntary increase of security, but it will suffice if the further gnment is made under pressure; and, if there has not been sure, the forbearance to sue will generally be presumed: *Glegg Bromley*, [1912] 3 K. B. 474; 81 L. J. K. B. 1081; such a umption, however, may be rebutted, *e.g.*, where the voluntary ease of security was not known to the creditor, *ibid.*, at 87.

Proof admissible to show by whom consideration was paid.

A mere statement in the deed that the consideration was paid by A does not exclude evidence that it was paid by B: *R.* v. *Inhabitants of Llangunnor* (1831), 2 B. & Ad. 616.

Consideration not necessary to validity of deed.

Although consideration is not necessary to the validity of a , yet if there be no consideration there may be a resulting for the grantor, but as to this, see p. 225, *infra*; and an assign- t of an expectancy, as distinguished from property, made out consideration, is wholly inoperative: *Re Tilt* (1896), 74 . 163; *Re Ellenborough, Towry-Law* v. *Burne*, [1903] 1 Ch. 72 L. J. Ch. 218.

) This statute has been replaced by section 172 of the Law of Property Act,

Consideration necessary to raise use.

A use cannot be raised without the consideratio of money, money's worth, blood, or marriage (*b*

Considerations insufficient to raise use

Thus a use was not raised by the consideration of "bein ancient acquaintances or chamber-fellows": *Warde* v. *Tuddingha* (1605), 2 Roll. Abr. 783, pl. 5; "having been school-fellows t gether": 2 Roll. Abr. 783, pl. 6; change of name, *Sir Christoph Hatton's Case*, Vin. Abr. Uses, H. pl. 8, p. 195; cited Jenk. Cent p. 81, ca. lx; *Garnish* v. *Wentworth* (1666), Carter, 137; and s *Sharington* v. *Stratton* (1565), Pl. Comm. 298, at p. 302; or "f divers good considerations": *Mildmay's Case* (1584), 1 Rep. 175 a *Wiseman's Case* (1585), 2 Rep. 15 a; *Smith and Lane's Case* (1589 1 Leon. 170; *Ward* v. *Lambert* (1595), Cro. Eliz. 394.

In covenant to stand seised.

In a covenant to stand seised, uses limited, to a bastard chil of the covenantor: Co. Litt. 123 a; *Gerrarde* v. *Worseley* (1580 Dy. 374 a; 1 Anders. 75; or to a stranger, whether in possession *Sir John Mordant's Case*, cited by Rede, J., Y. B., 21 Hen. (1506), 19; *Lord Paget's Case* (1591), 1 Anders. 259 and 26 pl. cclxx; 1 Leon. 194; Moore, 193; or in remainder: *Wiseman Case* (1585), 2 Rep. 15 a; 1 Anders. 140; Moore, 195; *Smith* *Risley* (1638), Cro. Car. 529; *S. C. sub nom. German* v. *Risle* Wm. Jones, 418; are void, because he is not within the consideratio

Powers in covenants to stand seised.

A power, which takes effect as the declaration of a use, containe in a covenant to stand seised is void, because the consideratio of blood, etc., does not extend to the persons in whose favour th power is exercisable. Thus a general power of appointment in covenant to stand seised was held bad in *Goodtitle and Pett* (1732), Fitzgib. 299; 2 Stra. 934; 2 Barnard. K. B. 10, 90 an 142; and in *Warwick* v. *Gerrard* (1686), 2 Vern. 7, where it w held that the power was bad in equity as well as at law.

Power to grant leases.

A general power to grant leases contained in a covenant t stand seised was held bad in *Mildmay's Case* (1584), 1 Rep. 175 a *Prince* v. *Green* (1598), cited 1 Ca. Ch. 161; *Cross* v. *Faustendit* (1607), Cro. Jac. 180; *Chute* v. —— (1661), 1 Lev. 30; *S. C. su nom. Lady Dacres* v. *Hazel*, 1 Keb. 34; and *Baynes* v. *Belso* (1679), T. Raym. 247; but *quaere*, what would be the effect of power to grant leases or to make a jointure in favour of a perso named in the deed who was within the consideration of blood See Sugd. Powers (8th ed.), 139; *Goodtitle and Pettoe* (1732 Fitzgib. 299; 2 Stra. 934; Barnard. K. B. 10, 90 and 142.

A general power of revocation can be reserved in a covenant t stand seised: Co. Litt. 237 a; Shep. Touch. 525.

Covenant with strangers to

It is now settled (contrary to the earlier opinion: *Smith* *Risley* (1638), Cro. Car. 529; *S. C. sub nom. German* v. *Risle*

(*b*) In view of the abolition of the Statute of Uses by the Law of Proper Act, 1925, this rule is of diminishing importance.

Wm. Jones, 418; *Whaley* v. *Tankard* (1672), 2 Lev. 52) that a covenant with strangers to stand seised to the use of persons within the consideration is good: *Thorne* v. *Thorne* (1682), 1 Vern. 141; see the pleadings at length, 2 M. & W. 512, n.

stand seised to use of relatives.

Uses can be raised by covenant in favour of the husband or wife, or the husband or wife hereafter to be taken, of a relative: *Sharington* v. *Stratton* (1565), Pl. Comm. 298, at p. 307; 2 Roll. Abr. 783, pl. 1, 784, pl. 2, 3, 4; and *Bould* v. *Wynston* (1607), Cro. Jac. 168; 2 Roll. Abr. 786, L.

A use limited to a person named in a covenant to stand seised may be supported by averment that such person is within the consideration of the covenantor's blood, although the deed is expressed to be in consideration of the covenantor's love for some other person, for the consideration so averred is not inconsistent with the consideration expressed: *Bedell's Case* (1607), 7 Rep. 40 a; *Harpur's Case* (1614), 11 Rep. 23 a; *Goodtitle* v. *Pettoe* (1732), 2 Stra. 934; 2 Barnard. K. B. 10, 90 and 142; Fitzgib. 299.

Relationship can be proved.

The reservation of a peppercorn rent is sufficient consideration to raise a use to support a recovery: *Barker* v. *Keate* (1677), 1 Mod. 262; 2 Mod. 249; 1 Freem. 249; 2 Vent. 35.

Peppercorn.

The Law of Property Act, 1925, has repealed the Statute of Uses (see Seventh Schedule, L. P. A., 1925). Consequently resulting uses cannot be created, and by section 60, sub-section 3 of the Law of Property Act, 1925, the omission in a voluntary conveyance of words declaring property to be conveyed for the use or benefit of the grantee shall not give rise to a resulting trust in favour of the grantor.

New Law.

Prior to the coming into operation of the Conveyancing Act, 1881, it was usual to put a receipt for the consideration in the body of the deed (in the operative clause) and also to indorse a further receipt on the deed: but in deeds executed since 1881 it is usual to omit the indorsed receipt, such receipt having been rendered unnecessary by that Act: Conveyancing Act, 1881, s. 54. This section is replaced without alteration by section 67 of the Law of Property Act, 1925.

Receipts.

The receipt in the body of the deed was, before the Supreme Court of Judicature Act, 1873 (*b*), came into operation (*i.e.*, November 1, 1875), conclusive at law that the purchase-money was paid.

Receipt formerly conclusive at law.

In *Rowntree* v. *Jacob* (1809), 2 Taunt. 141, where the circumstances were full of suspicion; in *Baker* v. *Dewey* (1823), 1 B. & C.

(*b*) This Act, with the exception of section 25, sub-section 2, sections 46, 64 and 66, has been repealed by the Supreme Court of Judicature (Consolidation) Act, 1925.

704; and in *Harding* v. *Ambler* (1838), 3 M. & W. 279; 7 L. J. Ex. 132; 49 R. R. 599, where by a miscalculation less tha the whole purchase-money was paid, but the receipt was for th whole; the receipt was held at law to estop the vendor fro denying that the purchase-money had been paid.

Purchase-money returned.

But even at law evidence was admissible that the purchas money had been returned: *Baker* v. *Dewey* (1823), 1 B. & C. 704 or to show some matter happening after execution which preventi the payment; as in *Deverell* v. *Whitmarsh* (1841), 5 Jur. 96 where the consideration was paid by cheque, which was di honoured; it was argued that the receipt was conclusive to sho that the money was actually paid; but Tindal, C.J., said (a p. 965): "Not at all. The parties may show what occurred a the time. Suppose the man put his hand on the table and toc the money back?" and it was held that evidence of the dishonou of the cheque might be given.

Receipt qualified by recital.

In *Lampon* v. *Corke* (1822), 5 B. & Ald. 606; 24 R. R. 488 *S. C. sub nom. Lambourne* v. *Cork*, 1 D. & R. 211, the recit being of an agreement to pay, and not of an actual payment, th operative part being "the said sum of £40 being now so paid t the said —— as hereinbefore is mentioned," and the receipt bein "the payment of which said several sums of money they the sai —— do hereby admit," it was held that the receipt either ha reference to some nominal considerations mentioned in the dee or that it was qualified by the recital so as not to estop the vend from denying that the money had been paid. This case is di cussed and was followed (by a majority of the Court) in *Bottre* v. *Summers* (1828), 2 Y. & J. 407; 31 R. R. 613.

Receipt never conclusive in equity, and not now conclusive either at law or in equity.

Neither the receipt in the body of the deed, no the indorsed receipt, was in equity conclusive tha the purchase-money had been paid, and this now the rule both at law and in equity.

In *Coppin* v. *Coppin* (1725), 2 P. Wms. 291; *Winter* v. *Lo Anson* (1827), 3 Russ. 488; 6 L. J. (o.s.) Ch. 7; 27 R. R. 17 *Hawkins* v. *Gardiner* (1854), 2 Sm. & G. 441; 97 R. R. 287; ar *Wilson* v. *Keating* (1859), 27 Beav. 121; on app. 4 De G. & 588; 124 R. R. 405, the vendor was allowed in equity to pro that the purchase-money had not been paid.

Third parties.

Third parties, however, were even in equity entitled to rely c the indorsed receipt.

Indorsed receipt.

"The presence of a receipt indorsed upon a deed for the fu amount of the consideration money has always been considered highly important circumstance. The importance attached to th

circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt and often a release under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt till the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand" : *per* Fry, L.J., *Bickerton* v. *Walker* (1885), 31 Ch. D. 151, at p. 159; 55 L. J. Ch. 227; and in *Morgan's Patent Anchor Co.* v. *Morgan* (1887), 35 L. T. 811, Amphlett, B. (at p. 813), also remarks on the importance of an indorsed receipt.

Indorsed receipt gives better equity.

A mortgagee by deposit of a conveyance with an indorsed receipt was held to have a better equity than the vendor who had not received the purchase-money mentioned in the receipt : *Rice* v. *Rice* (1853), 2 Dr. 73; 23 L. J. Ch. 289; 100 R. R. 43; *Hunter* v. *Walters* (1871), L. R. 7 Ch. 75; *French* v. *Hope* (1887), 56 L. J. Ch. 363; 56 L. T. 57. The transferee of a mortgage with an indorsed receipt was held to have a better equity than the mortgagor who had not received the whole of the money mentioned in such receipt : *Bickerton* v. *Walker* (*supra*), which overrules *Parker* v. *Clarke* (1861), 30 Beav. 54; 132 R. R. 180, unless that case can be distinguished on the ground that there was no receipt indorsed on the deed, which does not appear from the report. A receipt clause was held to be binding on the mortgagor as between himself and a sub-mortgagee, although the full amount acknowledged to have been received had not in fact been received : *Bateman* v. *Hunt*, [1904] 2 K. B. 530; 73 L. J. K. B. 782. See also *Powell* v. *Browne*, [1907] W. N. 228.

Absence of indorsed receipt.

On the other hand, the absence of the indorsed receipt or its unusual position was sufficient to put persons on inquiry as to whether the consideration had been paid. Thus, in *Kennedy* v. *Green* (1834), 3 Myl. & K. 699; 41 R. R. 176, the unusual position of an indorsed receipt was considered to give notice that a fraud had been committed; and in *Greenslade* v. *Dare* (1855), 20 Beav. 284; 24 L. J. Ch. 290; 109 R. R. 416, it was held that the absence of an indorsed receipt from a purchase deed put the purchaser on inquiry as to whether the purchase-money had been paid, but did not give constructive notice of any other irregularities in the purchase. See also *Barnhart* v. *Greenshields* (1853), 9 Moo. P. C. C. 18; 105 R. R. 1.

Indorsed receipt no longer necessary.

But by the Conveyancing Act, 1881, s. 55: "A receipt f consideration money or other consideration in the body of a de or indorsed thereon shall in favour of a subsequent purchase (which includes a lessee or mortgagee, and an intending purchas lessee or mortgagee, or other person, who for valuable consideratii takes or deals for any property: section 2 (viii)) "not havi notice that the money or other consideration thereby acknowledg to be received was not in fact paid or given, wholly or in part, sufficient" (which is probably the same as conclusive) "evider of the payment or giving of the whole amount thereof": *King Smith*, [1900] 2 Ch. 425; 69 L. J. Ch. 598; *Rimmer* v. *Webst* [1902] 2 Ch. 163; 71 L. J. Ch. 561.

Reliance must be placed on receipt.

But a purchaser cannot rely on this section of the Act unless was aware of the existence of the receipt. Thus where a buildi society executed the usual statutory receipt on a mortgage made them, and handed the deed with the receipt thus indorsed there to their solicitor, who purchased the equity of redemption a deposited the title deeds, other than the mortgage deed which suppressed, with his bank as security for a loan; it was held Chitty, J., that the bank, not having had notice of the mortgage the indorsed receipt, and not having advanced their money on t faith of the receipt, were postponed to the building society, w had in fact never been paid off: *Lloyds Bank, Ltd.* v. *Bullo* [1896] 2 Ch. 192; 65 L. J. Ch. 680; distinguished in *Capell Winter* (*infra*) on the ground that the decision in the former ca did not in any way turn upon estoppel.

But in a deed purporting to convey part of land held under trust for sale and executed in fraud of the beneficiaries who w not parties to the deed, the beneficiaries were not estopped by t receipt from saying that the money had not been paid: *Capell Winter*, [1907] 2 Ch. 376; 76 L. J. Ch. 496.

There must be express words acknowledging the receipt of su consideration: *Renner* v. *Tolley* (1893), 68 L. T. 815. See a *Burchell* v. *Thompson*, [1920] 2 K. B. 80; 89 L. J. K. B. 533.

Receipt on mortgage to building society.

The receipt given by a building society on payment off money advanced by the society on mortgage operates by stat 6 & 7 Will. 4 (1836), c. 32, s. 5, and Building Societies Act, 18 (37 & 38 Vict. c. 42), s. 42, as a reconveyance of the land to t person who has the best equity to the land: *per* Lord Watso *Hosking* v. *Smith* (1888), 13 Ap. Ca. 582, at p. 589; 58 L. Ch. 367.

New Law.

Section 55 of the Conveyancing Act, 1881, has been replac without alteration by section 68 of the Law of Property Act, 19 For the definition of "purchaser" in the latter Act, see section 2 (xxi).

CHAPTER XIII.

PARCELS.

General Description: Special Description: Inaccurate Description: Collective Name: General Descriptions mutually Restrictive: Special Description restricts General: Falsa demonstratio non nocet: General Description restricted to Matters ejusdem generis: Only Freeholds Pass by Freehold Assurances: Whether Leaseholds pass as Personal Property: Soil of Highway: Bed of Non-Tidal River: Islands: Tidal Rivers: Streets in Towns: Pathways: Private Roads: Uninclosed Strips: Strips near Commons: Party Walls: Creation of profits à prendre: Of Easements: Of Rights of Way: Extent of Right of Way: Exceptions, Reservations and Privileges distinguished.

General name.

A THING is always designated by (1) a general name, which is equally applicable to every member of the class to which it belongs, and (2) some superadded description to show which member of the class is intended.

"A house," "a farm," "a wood," are all general names; each of them equally fits every member of the class.

There are two modes of designating or identifying any particular member of the class.

Description by general names only.

First, the thing may be described by several general names; in other words, as belonging to several classes. In this case, if only one thing satisfies all the descriptions, that is the thing meant; if more than one thing satisfies all the descriptions, there is a case of equivocation.

It often happens that the same thing can be described by two totally different descriptions; *e.g.*, the same lands may be described by the two descriptions following: "the tithe-free lands in the parish of E.," and "the ancient woodlands inherited by A."

In each of these descriptions all the names are general, and in each case, if any one of the general names is omitted, a larger number of things is described than if all the names are used; in other words, where a thing is described by several general names, the descriptions are mutually restrictive.

Description by general name and

Secondly, to the general description may be added either the individual name, if there be one, or a special description which fits

special description.

only the particular member of the class designated by the gene description. Thus, the pieces of land before described may described as "the woods called Highhurst," or "the woods in t occupation of A." More commonly, however, there are added the general description both the individual name and a spec description, as "the ancient woodlands in the parish of E., kno as Highhurst, in the occupation of A."

It will be observed that if a description, though general in for does in fact designate one thing only, the addition of any spec description is useless; but if, as usually happens, a general descr tion designates more than one thing, the special descripti indicates which of those things is meant; in other words, if a thing exists which satisfies both the general and the speci description, that only is intended, *i.e.*, the special descripti restricts the general description.

Inaccurate description.

It sometimes happens that, while the description renders certain what is intended, as "A.'s house in London," where A. h only one house there, some further description is added which wholly or partially inaccurate. If A.'s house is in the occupati of B., and is described as "A.'s house in London, in the occupati of C.," the words "in the occupation of C." are inaccurate, a should be rejected.

In a simple case like the one just mentioned there is lit difficulty; but cases occur in which part of the descripti designates all the parcels in such a manner that if that part sto alone it would be accurate, while the other words of the descripti apply to a part only of the parcels, so that it remains doubt whether these latter words are intended to restrict the other part the description, or are to be rejected as inaccurate. Thus, if A. h lands known as "the T. estates," in the adjoining counties Hants and Wilts, the description "A.'s T. estates in the county Hants" would probably be intended to pass only that part of t property which is situate in Hants; in other words, the phra "in the county of Hants" would be restrictive. But if A. had house called S., standing in the two counties, the description "A house called S., in the county of Hants," would probably intended to pass the whole house called S.; in other words, t phrase "in the county of Hants" would not be restrictive; the or reason for introducing it is to help to point out which house intended. It would be more difficult to determine what is mea by "Brosley Farm, in the county of Hants," if the farm we partly in Hants and partly in Wilts.

Collective name.

A collective name is the name of a group of things, not nec sarily of the same class; thus, "an estate" may include corpore and incorporeal hereditaments of any nature; "a farm" includes

house, and arable and pasture lands. One superadded description will generally denote the particular group intended, as "A.'s estate," or "A.'s issue," and a further description may either, *first*, show that some members of the group are alone intended, as "A.'s estate in the county of H.," where A.'s estate lies in the counties of H. and W.; or "A.'s adult issue," where A. has issue both adult and under age; or, *secondly*, be intended as a further designation of the particular group as "A.'s estate in the occupation of B." where B. occupies the whole of A.'s estate.

Though the three following rules have often been laid down, there is so much difficulty in applying them, mainly owing to the fact that words descriptive of occupation, locality, and the like are sometimes used as general names, *i.e.*, as restrictive words, in which case they cannot be rejected, and sometimes as words of special description, in which case, if they do not fit the thing, or all the things, described by the rest of the description, they must be rejected, that it is considered convenient to state all the rules before proceeding to an analysis of the cases.

Where the descriptions are all general or collective all must be satisfied.

Where the parcels are described by several general descriptions, or by a collective, and a general, description, those only are intended which satisfy all the descriptions.

This rule may also be stated in each of the following modes :— "General descriptions are mutually restrictive"; "If the parcels are described as being members of more than one class, those only are intended which are members of each class."

Where there is a general and a special description both must be satisfied.

Where the parcels are described by a general, or collective, and also by a special description, those only are intended which satisfy both descriptions : *Wrotesley* v. *Adams* (1558), Plow. 187, at p. 191.

These two rules are often expressed as follows :—

"*Non accipi debent verba in demonstrationem falsam quae competunt in limitationem veram.*"

"Though falsity of addition or demonstration doth not hurt, where you give the thing a proper name, yet nevertheless if it stand doubtful upon the words, whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, the law will never intend error or falsehood" : Bacon's Law Tracts, Rule 13.

And at the end of the same rule, after giving instances of things having several descriptions attached to them, Bacon says : "But if I have some land wherein all these demonstrations are true, and

some wherein part of them are true and part false, then shall th be intended words of true limitation to pass only those lan wherein all those circumstances are true": Bac. Law Tract Rule 13.

"*Quando carta continet generalem clausulam, posteaq descendit ad verba specialia, quae clausulae generali sunt co sentanea, interpretanda est carta secundum verba specialia.* T same rule almost word for word is put and agreed on both sides Y. B. 7 Edw. 3 (1333), 10 a, *Margery Mortimer's Case*, sc 'Where a deed speaks by general words and afterwards descen to special words, if the special words agree to the general word the deed shall be intended according to the special words; as if man grants a rent *in manerio de D., percipiend*' in 100 acres land, parcel of the same manor, with clause of distress in t 100 acres, the rent shall issue out of the 100 acres only, and t general words shall be construed according to the special words'" *Altham's Case* (1610), 8 Rep. 150 b, at 154 b.

"The rule means that if it stand doubtful upon the word whether they import a false reference or demonstration, or wheth they be words of restraint that limit the generality of the form words, the law will never intend error or falsehood. If, therefor there is some land wherein all the demonstrations are true, ar some wherein part are true and part false they shall be intende words of true limitation to pass only those lands wherein all t circumstances are true": *per* Alderson, B., *Morrell* v. *Fish* (1849), 4 Ex. 591, at p. 604 (a case on a will); 19 L. J. Ex. 27 80 R. R. 709. See also *Watcham* v. *East Africa Protectorat* [1919] A. C. 533, at p. 541; 87 L. J. P. C. 150.

"It is quite clear, to my mind, that if there be a conveyan of real estate described in general terms followed by a definite ar specific enumeration of particulars, as by schedule with or witho plan, which enumeration omits something which might otherwi have been covered by the general description, then, general speaking, the designation by schedule and plan would not be rea as an imperfect enumeration to be disregarded as '*Fal demonstratio*,' but as restrictive of the prior general description" *per* Joyce, J., in *Re Brocket*, [1908] 1 Ch. 185, at p. 196; 7 L. J. Ch. 245 (a case on a will).

In cases falling within this rule it will generally be found th there is only one special description, as "A.'s house," "Brosle Farm"; if there are several special descriptions and each of the denotes the same thing, as "Brosley Farm, which is delineated the map annexed hereto," where the map accurately describ Brosley Farm, the rule applies, but if they do not both denote t same thing the next rule applies.

Falsa demonstratio non nocet.

Where the parcels are described by both a general or collective, and a special description, or divers special descriptions, and nothing exists which satisfies all descriptions, but something exists which satisfies some or one of them, and is described with sufficient certainty, the other or others may be disregarded.

In cases falling within this rule it will generally be found that there is more than one special description, though of course there *may* be only one special description, as in *Roe* v. *Vernon and Vyse* (1804), 5 East, 51, stated *infra*, p. 239, where the statement of the rent was the only special description.

The rule is sometimes stated as follows: "*Falsa demonstratio non nocet*": or, "if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect."

The Latin rule should have the words "*cum de corpore constat*" added to it to do full justice to the maxim it inculcates: *per* Lord Sumner, *Eastwood* v. *Ashton*, [1915] A. C. 900, at p. 914; 84 L. J. Ch. 671.

"Whenever there is in the first place a sufficient certainty and demonstration, and afterwards an accumulative description, and it fails in point of accuracy, it will be rejected": Preston in Shep. Touch. 247. (The position is immaterial. See *infra*, p. 245.)

"There is a diversity where a certainty is added to a thing that is incertain" (*i.e.*, described by a general name) "and where to a thing certain. For if I release all my right in all my lands in Dale which I have by descent on the part of my father, and I have lands in Dale by descent on the part of my mother, but no lands by descent on the part of my father, there the release is void, for if the releasee will aid himself by the release he ought to aver that I had such lands in Dale by descent on the part of my father, to which the release extended, and the same is issuable, and if he cannot aver this, then the release is void. And so the words of the certainty—*viz.*, which I have by descent on the part of my father—being added to the general words which were incertain, are of effect. But if the release had been in Whiteacre in Dale which I have by descent on the part of my father, and I had it not by descent on the part of my father, but otherwise, yet the release is good, and the releasee shall not be compelled to take any averment, for the thing was certainly expressed by the first words, in which case the addition of another certainty is not necessary

but superfluous, and therefore he shall not there take an avermen upon a thing which is of no effect, be the same true or false" *Wrotesley* v. *Adams* (1558), Plowd. 187, at p. 191.

The distinction taken in the above passage is well pointed o in the marginal note to *Roe* v. *Vernon and Vyse* (*supra*, p. 23 as follows: "Where there is a grant of a *particular* thing on sufficiently ascertained by some circumstance belonging to i the addition of an allegation mistaken or false respecting it will n frustrate the grant; but where a grant is in *general* terms, the the addition of a particular circumstance will operate by way restriction and modification of such grant."

"The rule is clearly settled, that when there is a sufficie description set forth of premises by giving the particular name a close, or otherwise, we may reject a false demonstration": *p* Parke, J., *Doe* v. *Galloway* (1833), 5 B. & Ad. 43, at p. 5 2 L. J. K. B. 182; 39 R. R. 381.

"As soon as there is an adequate and sufficient definition, wi convenient certainty, of what is intended to pass by a deed, a subsequent erroneous addition will not vitiate it": *per* Parke, B *Llewellyn* v. *Earl of Jersey* (1843), 11 M. & W. 183, at p. 18 12 L. J. Ex. 243; 63 R. R. 569; adopted *per* Monahan, C.J., *Dublin and Kingstown Ry. Co.* v. *Bradford* (1857), 7 Ir. C. L. Re 57, at p. 63; *Eastwood* v. *Ashton*, [1915] A. C. 900, at p. 91 84 L. J. Ch. 671.

"One of the rules of construction is '*falsa demonstratio n nocet*,' which means that if there be an adequate and sufficie description with convenient certainty of what was meant to pass, subsequent erroneous addition will not vitiate it": *per* Alde son, B., *Morrell* v. *Fisher* (1849), 4 Exch. 591, at p. 604; 19 L. Ex. 273; 80 R. R. 709 (a case on a will).

Examples of words used restrictively.

In all the following cases the added descriptions were held to restrictive.

Name of place.

Grant of "all those messuages, &c., in the occupation of B, the city of W, formerly belonging to the hospital of W." *Hel* that lands in the occupation of B, not within the city of W, b which formerly belonged to the hospital of W, did not pass *Doddington's Case* (1594), 2 Rep. 32 b; *S. C. sub nom. Hall Peart*, Pop. 60.

"The King had two mills under one house and granted all t houses, mills, lands, &c. in Wells and the suburbs and liberti thereof. One of the mills was in Wells and the other out of We and the liberties and suburbs thereof, and whether this mill pass forasmuch as both were under one roof? and adjudged for t plaintiff that it passed not": *Hall* v. *Combes* (1594), Cr Eliz. 368.

R, tenant for years of the farm called C, consisting of H and other parcels, appoints A his executor and dies. A demises all except H to B, and H to F, and afterwards grants the residue of his term in the whole to B and F. The reversioner grants a rent issuing out of all his lands and tenements commonly called C, formerly in occupation of R, and now in the tenure and occupation of B. *Held*, that H was not charged with the rent : *Ognel's Case* (1587), 4 Rep. 48 b, at p. 50 a; 1 Anders. 178; 4 Leon. 115. Occupancy.

Demise of "all my house and two yard-lands in B in the possession of G"; G was in possession of all except two acres. *Held*, that the two acres did not pass : *Bartlett* v. *Wright* (1593), Cro. Eliz. 299. (It should be remembered that a yard-land often consisted of a number of detached strips.)

Demise of "all that messuage, &c., on the south side of Speenham land, called the 'Old Fighting Cocks,' now or late in the occupation of J." The question being whether the demise included the soil of a gateway under a portion of the messuage, leading to a yard behind it, in which were some small houses not included in the demise, the tenants of which had always used the gateway, it was held that, in the absence of evidence that the soil of the gateway had been in the exclusive occupation of J, it did not pass by the demise : *Dyne* v. *Nutley* (1853), 14 C. B. 122; 98 R. R. 566. Williams, J., remarked (at p. 127) that "the words 'now or late in the occupation of J' were essential words and not mere words of demonstration."

On the point what is an occupation of land it has been said : "If a man grant all his lands called D in the tenure, occupation or possession of J S, and J S had parcel of D in lease, and parcel not, but depastured it with his cattle, all shall pass by the grant : so where the parcel which was not in lease to J S was enclosed, being a wood, but the fence was thrown down in several places whereby the cattle used to escape generally and depasture in the wood, this is a sufficient occupation to make this pass, for the taking of the herbage is a sufficient occupation" : *Dockray* v. *Befis* (1614), 2 Roll. Abr. 54 Q. 1 and 2; cf. Co. Litt. 4 b. Occupation, what amounts to.

Queen Elizabeth granted the manor of D which she had by attainder of Sir Thomas Wyat, whereas in truth she was seised thereof by descent. Dyer, J., thought the grant was void, and Brown and Weston, JJ., agreed that it would be void at common law, because the Queen was deceived in her grant; but the statute of misrecitals applied, for the substance of the thing granted appeared with certainty and the statute supplied all other defects : *Anon.* (1563), Moore, 45. Title.

A grant of "all my houses in Chesterfield, &c. in the tenure of A B C which my father purchased from" divers named persons.

Held, that lands and houses which the grantor's father ha inherited did not pass : *Clay and Barnet's Case* (1613), Godb. 23

Where an Act of Parliament giving powers of sale and exchang over estates settled by a former settlement and Act, contained recital of the objects of the Act restricted in terms to such settle estates, and then vested in trustees all and singular the lands certain counties limited by the former settlement and Act, whic were described in the schedule. *Held*, that lands not included the former settlement or Act, though described in the schedul did not pass : *Howard* v. *Earl of Shrewsbury* (1874), L. R. 17 E 378; 43 L. J. Ch. 495. (The settlement and Act are given at lengt *Shrewsbury* v. *Scott* (1859), 6 C. B. (N.S.) 1.)

Quality.

A lease of a piece of land "lying near to the said cotta containing, &c., lately used as garden ground and some time sin in the tenure of R B," was held not to pass a particular piece waste land unless it could be shown to have been used at som time or other as garden ground : *Kingsmill* v. *Millard* (1855 11 Exch. 313; 105 R. R. 538.

Enumeration.

Settlement of "all that messuage or dwelling-house, with th lands, &c., thereto belonging, situate, &c., and now or late in th occupation of B, his under-tenants or assigns, and which sa messuage, dwelling-house, and lands are also known or describe by the names, and contain the several quantities by admeasur ment, following, that is to say, &c." Then followed a list of th names and acreages of the several closes contained in the farn with the omission of four. *Held*, that although the whole farn including the four closes, had been let to B at one rent, the fo closes not mentioned in the settlement did not pass : *Griffiths* *Penson* (1863), 1 N. R. 330; 9 Jur. 385.

Inventory or schedule.

A conveyance of all that messuage, &c., with the barns, &c and several closes, &c., of land called G Farm, in the occupation D B, and containing altogether, &c., and consisting of the sever particulars specified in a schedule and more particularly delineat in the map drawn in the margin of the said schedule, was held n to pass a close omitted (by mistake as was alleged) from the ma and schedule : *Barton* v. *Dawes* (1850), 10 C. B. 261; 19 L. J. C. 302; 84 R. R. 562.

Bill of Sale.

Assignment by bill of sale to B of "all the household goo and furniture of every kind and description whatsoever in the hou No. 2, Meadow Place, more particularly mentioned and set for in the inventory or schedule of even date herewith, and given to B on the execution hereof." At the time of the execution o chair was delivered to B in the name of the whole of the goo The inventory did not mention all the goods in the house. *Hel* that no goods passed except those specified in the inventor

Wood v. *Rowcliffe* (1851), 6 Exch. 407; 20 L. J. Ex. 285; 86 R. R. 350. Where all the goods in the grantor's house "which are more particularly described in the schedule hereto," were assigned, it was held that the reference to the schedule did not restrict the generality of the words in the body of the deed: *Baker* v. *Richardson* (1858), 3 W. R. 663; and in *Cort* v. *Sagar* (1858), 3 H. & N. 370; 27 L. J. Ex. 378; 117 R. R. 731, a reference to schedules was held not to be restrictive under special circumstances; but, on the other hand, where an assignment of a debtor's property included his chattels in the most comprehensive words, "all of which are intended to be more particularly described in the schedule hereunder written," it was held that only those chattels which were specified in the schedule passed: *Re Craig* (1869), Ir. R. 4 Eq. 158.

Will.

Devise by testatrix of "the real estate to which I under the codicil to the will of my late father" became entitled, "namely, the residence known as Orford House in the parish of Oakley in the said county of Essex" and lands and hereditaments "in the same county" to her sister for life with remainders over. The testatrix then disposed of her residue. *Held*, that a freehold in London which in fact passed to the testatrix by virtue of the aforesaid codicil did not pass to her sister, but fell into residue. *Re Brocket*, [1908] 1 Ch. 185; 77 L. J. Ch. 245 (a case on a will).

Map.

A conveyance contained a full and accurate description of the "Dromardmore" estate, containing 1,085 acres, "and described in the annexed map." The annexed map was proved to comprise several acres of land which formed no part of Dromardmore, but were part of Dromardbeg. *Held*, that the first description should prevail, and that nothing passed by the deed which was not part of Dromardmore: *Roe* v. *Lidwell* (1860), 11 Ir. C. L. Rep. 320; *Horne* v. *Struben*, [1902] A. C. 454; 71 L. J. P. C. 88.

In *Lyle* v. *Richards* (1866), L. R. 1 E. & Ir. App. 222, a boundary line of the premises was described "as a line drawn from A's house to a boundstone, situate, &c.," and the description of the parcels was followed by the words "and which said premises are particularly delineated by the map on the back of this sett"; the house was incorrectly drawn on the map. *Held*, that the map must be taken as part of the description, and that the boundary line must be taken as drawn on the map. This case will be found fully discussed in Dart, V. & P (7th ed.), 1011, where Mr. Dart says: "Lord Westbury dissented from this view, and held that as the error in the plan could not be discovered without the aid of extrinsic evidence, there was a latent ambiguity, which was matter of fact to be determined by the jury on the evidence, not matter of law depending on the construction of the deed. A plan is a part of a deed to be interpreted, like every portion of the instrument, by the

Judge : but, as Lord Westbury observed, the question here was no one of the interpretation of the deed itself, or even of the con struction of the description of the parcels, but of the inference t be derived from a map as to the relative position of two object one of which was proved to be erroneously laid down. As soon a that proof was admitted, it became obvious that the true positic in nature of the thing erroneously laid down, and the true relativ position of the adjoining objects, must both be ascertained b external evidence. The latter seems the sounder view : the con struction of the plan was matter of law so long only as its accurac was unimpeached : being proved to be inaccurate, it became question of fact what parcels were comprised in the lease : for did not follow that, because the boundary line was drawn from th north-east corner of the house, as incorrectly represented on th plan, it would have been drawn from the same point, if the tru site of the house had been shown."

A vendor conveyed to a purchaser property described as "Bam Hey Farm" (then followed particulars as to acreage and occupa tion) "all which said premises are more particularly described i the plan endorsed on these presents and are delineated and coloure red in such plan." The plan comprised a strip of land which though formerly forming part of Bank Hey Farm, was, at the dat of the conveyance, in the possession of adjoining owners or the tenants, who had acquired by the Statute of Limitations a tit adverse to that of the vendor. *Held*, that the description wit reference to the plan must prevail and that the said strip wa included in the conveyance : *Eastwood* v. *Ashton*, [1915] A. C 900; 84 L. J. Ch. 671.

Map must be referred to in deed.

In order to incorporate a map into a conveyance it is no sufficient that it be merely annexed thereto and purport to be th map referred to in the conveyance, it must be in fact referred t in the conveyance : *Re Otway's Estate* (1862), 13 Ir. Ch. Rep. 22 *Wyse* v. *Leahy* (1875), Ir. R. 9 C. L. 384; and probably a ma drawn on but not referred to in a conveyance could not be used t explain the conveyance. Words referring to particulars of sale wi probably not incorporate in the conveyance the map which wa annexed to or formed part of such particulars : *Barlow* v. *Rhod* (1833), 1 Cr. & Mee. 439; 2 L. J. Ex. 91; 38 R. R. 653; but *sembl* a recital will : *Eastwood* v. *Ashton*, [1915] A. C., at p. 910.

Right of purchaser to map.

As to the right of a purchaser to have a map or plan on h conveyance : *Re Sparrow and James' Contract*, [1910] 2 Ch. 6 79 L. J. Ch. 491; *Re Sansom and Narbeth's Contract*, [1910] 1 C 741; 79 L. J. Ch. 374.

Special description.

Where one having customary tenements, compounded an uncompounded, surrendered to the use of his will "all and singula

he lands, tenements, &c., whatsoever in the manor, which he held f the lord by copy of court-roll, in whose tenure or occupation oever the same were, being of the yearly rent to the lord in the hole of £4 10s. 8d. and compounded for"; it was held that the ords "compounded for" restrained the operation of the surrender o that description of copyholds then belonging to the surrenderor, nd that the words "being of the yearly rent of, &c.," which were ot referable to any actual amount of the rents either compounded r uncompounded, though much nearer to the whole than to the ompounded only, could not qualify or impugn that restriction: *Roe* v. *Vernon* (1804), 5 East, 51.

A conveyance of two closes "formerly copyhold but since nfranchised." *Held*, not to include an adjoining copyhold strip ot enfranchised: *Early* v. *Rathbone* (1888), 57 L. J. Ch. 652.

On the other hand there are numerous cases in which the added escription has been rejected as mere *falsa demonstratio*. Examples of rejection of words.

Title.

"If the release had been in Whiteacre in Dale, which I have by escent on the part of my father, and I had it not by descent on he part of my father, but otherwise, yet the release is good . . . or the thing was certainly expressed by the first words, in which ase the expression of another certainty is not necessary": *Vrotesley* v. *Adams* (1558), Plow. 187, at p. 191; *Earl of Leicester* . *Heydon* (1571), Plow. 390, at p. 395; Shep. Touch. 247.

Name.

Conveyance of all "that part of the Bog of Allen and Clunagh tuate in the barony of Carbery and county of Kildare containing 77 acres, 3 rods, 24 poles, as described by a map annexed hereto." turned out that part of the land described by the map amounting 20 acres, 3 rods, 6 poles, formed part of the Bog of Muckland, ot of Allen and Clunagh. *Held*, that the whole of the land escribed in the map passed. Willes, J., in delivering the opinion the Judges, said, "The words of the conveyance, taken in onnection with the map, which is referred to, and made part of , are sufficient to describe the land in question, and to express intention to convey it. The omission to describe the land by e name of 'Muckland,' and even the description of it as within nother denomination, amount at most to an erroneous additional escription of that which is identified beyond doubt by reference to e map, *constat de corpore*": *Rorke* v. *Errington* (1859), 7 . L. C. 617, at p. 625.

Quality.

Grant of all that garden plot late in the tenure of Juxten, now the tenure of Ireland. Ireland had built houses on part of the ot. *Held*, that the reversions of these houses passed: *Burton* v. *rowne* (1622), 2 Roll. Rep. 261, 265, 267; Palm. 319; Cro. Jac. 8.

Quantity.

"If one grant in this manner 'all my meadow in D containing

ten acres,' whereas in truth his meadow there doth contain twen acres, it seems this is a good grant for the whole twenty acres' Shep. Touch. 248; *Willoughby* v. *Foster* (1552), Dy. 80 b.

A conveyance was made by reference to a schedule, and t portion of the schedule which related to the parcel in questio stated it in the first column, which was headed, "No. on the pla of the Briton Ferry Estate," to be "153 b"; in the second colum under the heading "Description of Premises," it was stated to "a small piece marked on the plan"; in the third, it was describ as being in the occupation of J E; and in the fourth, as containi thirty-four perches. The piece 153 b, as marked on the pla contained twenty-seven perches only. *Held*, that the descripti in the plan must prevail, the acreage being rejected as *fal demonstratio: Llewellyn* v. *Earl of Jersey* (1843), 11 M. & W. 18 12 L. J. Ex. 243; 63 R. R. 569. "The portion conveyed is pe fectly described, and can be precisely ascertained, and no difficul arises except from the subsequent statement that it contains thirt four perches. That, however, becomes merely a false description that which is conveyed with convenient certainty before . . . It is mere *falsa demonstratio*, and does not affect that which is alrea sufficiently conveyed": *per* Parke, B., 11 M. & W. 183, at p. 18 12 L. J. Ex. 243, at p. 246.

Demise of "all that part of the townland of B, containing 5 acres, arable, meadow, and pasture, English statute measure, f three lives renewable for ever, bounded by" certain specifi boundaries. *Held*, to pass 400 acres of bog and land reclaim from bog lying within the same boundaries in addition to the 5 acres: *Jack* v. *M'Intyre* (1845), 12 Cl. & F. 151; *S. C. sub no Dawson* v. *Bell* (1840), 3 Ir. L. R. 140; (1842), 5 Ir. L. R. 229.

Boundaries. "Then it is described as bounded on the east by (*inter al* the defendant's property. But this general description of t boundaries does not cut down the effect of the prior descriptic When, after a description of a property, it is stated that on o side it is bounded by a certain other property, and it appears th it is not so bounded for every inch, there is an inaccuracy in t statement of the boundary, but this is not enough to exclude wh is not so bounded, if it appears from the evidence to have be part of the property dealt with, and the previous description that property is sufficient to include it": *per* Jessel, M.R., *Fran* v. *Hayward* (1882), 22 Ch. D. 177, at p. 181; 52 L. J. Ch. 291.

Award map. An award map made in pursuance of the Commons Act, 18 held not conclusive as to the true boundaries of the commo *Collis* v. *Amphlett*, [1918] 1 Ch. 232; 87 L. J. Ch. 216; reversed the evidence without deciding as to the map, [1920] A. C. 27 89 L. J. Ch. 101.

Conveyance of land, the exact dimensions being stated in the ırcels and marked on a plan, and stated to be, though not in fact, bounded on the west by the seashore." *Held* (Romer, L.J., ss.), that the latter words must be rejected : *Mellor* v. *Walmesley*, 905] 2 Ch. 164; 74 L. J. Ch. 475.

Occupancy.

"If one grant in this manner 'all my manor of W, late parcel the possession of the Abbot of S, and late in the possession K,' and in truth it was never in the possession of K; this grant good notwithstanding" : Shep. Touch. 247.

Lease of "all their farm in B in the occupation of W." "The ase is of all their farm in B, which word (*farm*) is a capital essuage, and all the lands lying to it, and signifies the chief house ıd the lands belonging to it, and not a common house, and so ıs a certainty in itself. And when it goes further and says, *in e tenure and occupation of W*, this is of no effect, for if it was ɔt in his tenure and occupation, yet it should pass, for there a certainty in the thing demised, *viz.*, the farm in B, and so ıother certainty put to a thing which was certain enough before, of no manner of effect" : *per Curiam*, *Wrotesley* v. *Adams* 558), Plow. 187, at p. 191.

A man having lately purchased a house in D of T C, and having other house in D, made a conveyance thereof by the description, the messuage lately of R. C. in D." *Held*, that it passed : *indham* v. *Windham* (1581), Dy. 376 b; see also Shep. Touch. 7, 248.

Demise of "all that glebe land lying in A, *viz.*, seventy-eight res of land, and also the tithes of the said seventy-eight acres, all ıich lately were in the occupation of P." It appeared that P had ver been in occupation of the tithes. *Held*, nevertheless, that ey passed by the lease : *Swyft* v. *Eyres* (1639), Cro. Car. 546; C. *sub nom. Vicars Choral de Litchfield* v. *Ayres*, W. Jones, 435.

Where the words of a deed were sufficient to pass all the ɔperty comprised in a former deed, but the description of ɛupancy was incorrect, the property passed : *Wilkinson* v. *Malin* 332), 2 Cr. & J. 636; 2 Tyr. 544; 1 L. J. Ex. 234; 37 R. R. 791.

Lease of "all that part of the park called B, situate and being the county of O and now in the occupation of S," lying within tain specified abuttals, together with the houses belonging reto, "and which now are in the occupation of S." *Held*, that ıouse on a part within the abuttals, but not in the occupation S, passed : *Doe* v. *Galloway* (1833), 5 B. & Ad. 43; 2 Nev. & M. ; 2 L. J. K. B. 182; 39 R. R. 381.

A house was demised to A except the roof, which the landlord ıined and soon afterwards demised to the owner of the adjoining ıse. After the determination of the lease to A, the landlord

demised the house by the description of "all that shop, situate &c., as the same was late in the occupation of A." *Held*, that t words, "as the same was late in the occupation of A," w inserted for the purpose of identification only, and not of restricti the property which passed, and accordingly that the roof passe *Martyr* v. *Lawrence* (1864), 2 De G. J. & S. 261; 139 R. R. 99.

Locality.

If a parish lie in two counties, *viz.*, Berks and Wilts, and o grant in this manner, "all his close called Callis in the parish Hurst in the county of Berks," and in truth the close doth lie in t county of Wilts; this is a good grant to pass the close: *Nor Case* (1570), Dyer, 292 b.

Distinction between parish and vill.

It is necessary to bear in mind the distinction between a par and a vill: "The civil division of the kingdom was originally i counties, hundreds and vills, tithings, or townships; for parisl were divisions only in reference to ecclesiastical affairs, of wh the common law took no notice; but in process of time parisl became divisions in reference to civil matters": 4 Cruise, D tit. xxxii, c. 21, s. 32. Demivills and hamlets are civil divisio smaller than vills: 1 Bl. Comm., p. 114; "but 'vill' a 'hamlet' are in common acceptation used as synonymous terms *per* Kenyon, C.J., *R.* v. *Morris* (1792), 4 T. R. 550, at p. 5 There may be several vills or towns in a parish or several parisl in a town: Com. Dig., tit. Parish.

Hamlet.

It appears that a conveyance of all a man's lands in a nam parish, or in named liberties, will pass his lands in every vill that parish or those liberties: *Waldron* v. *Ruscarit* (1671), 1 Ve 170; *Jones* v. *Wait* (1675), 1 Mod. 206; *S. C. sub nom. Lever Hosier*, 2 Mod. 47.

And where there are several vills, if the constablewick of the o goes over all the rest, that is the superior or mother-vill, and land which is (*sic*) the other, shall pass *per nomen* of all the la in that: *Waldron* v. *Ruscarit* (1671), 1 Vent. 170; *S. C. sub no Waldron* v. *Roscarriot*, 2 Keb. 802—848; 1 Mod. 78.

Town.

But if a fine be levied of lands in a town, lands in a hamlet that town will not pass thereby when there are constables of hamlet distinct from the constables of the town; "so that th were as two vills": *Anon.* (1671), 1 Vent. 143. And a conveya of all a man's land in A, where there is both a parish and a vill that name, will pass only the lands in the vill: *Whites* v. *Far* (1599), 2 Roll. Abr. 54, pl. 32; 2 And. 124, ca. lxx; *Stork* v. *F* (1606), Cro. Jac. 120; *S. C. sub nom. Stoke* v. *Pope*, 2 Roll. A 54, pl. 30 and 31; *sub nom. Stock* v. *Pope*, Noy, 17; *Amys Cowley* (1648), Aleyn, 88. But *Anon.* (1597), Owen, 60, is *con* And where no part of the lands was situate in the vill they w nevertheless held to pass by an assurance by deed and recove

being described in the deed as lying in the parish of R, and in the recovery as lying in R, for the deed and recovery were but one assurance: *Addison* v. *Otway* (1677), 1 Mod. 250; 2 Mod. 233; 3 Keb. 771; 2 Vent. 31; Freem. K. B. 227, 240.

But in a more modern case, where Belforth was the name of a parish, and also of a vill in the parish, in the deed the parcels were described as the tithes of the village of Belforth, but in the recovery as the tithes of the parish of Belforth, and it was held that the tithes that were in both the vill and the parish passed, and that those in the parish but not in the vill did not pass: *Gibson* v. *Clark* (1819), 1 Ja. & W. 159; 20 R. R. 266.

If a place be named generally, it is *prima facie* a vill: *Addison* v. *Otway* (1677), 1 Mod. 250; 2 Mod. 233; 3 Keb. 771; 2 Vent. 31; Freem. K. B. 227, 240; *Vinkeston* v. *Ebden* (1698), cited 2 Salk. 401.

Parish.

"If the grant be in this manner, 'All that my house in the occupation of J S, in St. Andrew's parish,' whereas in truth it is in the parish of K, but in the occupation of J S, it seems this grant is good to pass the house": Shep. Touch. 247. *Sed vide Campian's Case* (1574), Dyer, 292 b.

"No man can doubt of the intent of this deed to pass those lands; it has conveyed so many acres in the possession of A, B and C, the name of the parish only is mistaken. . . . Why did the parties mention the parish at all in the deed? It was unnecessary": *per* Mansfield, C.J., *Lambe* v. *Reaston* (1813), 5 Taunt. 207, at p. 211; 1 Marsh. 23; but see *Cotterel* v. *Franklin* (1815), 6 Taunt. 284.

Map.

Demise of all minerals in, upon, or under all or any part of certain hereditaments "described and set forth in the map hereunto annexed, and also in, upon, or under all or any part of M, all which premises are situate in the townships of, &c., and are bounded, &c., and contain together 1,400 acres of land or thereabouts, all which are particularly described, delineated, and distinguished in the map or plan thereof annexed to these presents, and which by the agreement of all the said parties hereto is meant and intended to be taken as part of this indenture." *Held*, on dispute arising as to the boundary, and the map being on so small a scale that it was impossible that it could ascertain the boundary with sufficient precision, that the words of the demise were not to be controlled by the map: *Taylor* v. *Parry* (1840), 1 Sco. N. R. 36; 1 Man. & Gr. 604; 9 L. J. C. P. 298; 56 R. R. 459. See also *Fox* v. *Clarke* (1874), L. R. 9 Q. B. 565, at pp. 570, 571 (judgment of Cleasby, B.); 43 L. J. Q. B. 178, where the map annexed to the conveyance was very small and not drawn to scale.

Reference to plan.

A conveyance of lands excepted a piece of land particularly

described in the parcels and by reference to a plan; the pla included part of the excepted land in the conveyed land. *Hel* the description on the plan was a false demonstration which mig be rejected: *Dublin and Kingston Ry. Co.* v. *Bradford* (1857), Ir. C. L. Rep. 57.

Conveyance of a capital messuage and all (*inter alia*) "yar thereto belonging and therewith occupied and enjoyed . . delineated on the plan and thereon coloured," with the usu general words, which comprised yards. *Held*, to pass a part of stable-yard which was used with the messuage and delineated, b not coloured, on the plan: *Willis* v. *Watney* (1882), 30 W. R. 42 51 L. J. Ch. 181.

Erroneous enumeration.

Cases of erroneous enumeration must be carefully distinguish from cases where the first description, being general in charact is restrained by the subsequent enumeration of the particulars, in *Griffiths* v. *Penson* and other cases cited *ante*, p. 236.

Bargain and sale of all his woods, underwoods, etc., standin etc., in the whole of his manor of C, *viz.*, in all his wood called and in all his wood called F. *Held*, that woods in C, not being a of the woods afterwards expressly named, passed by the conve ance: *Stukeley* v. *Butler* (1614), Hob. 168.

Schedule.

The mortgage of a foundry, with the engines, fixtur machinery, tools, and working plant therein, described the chatt assigned as being "more particularly enumerated and specified an inventory of even date herewith, to be signed by the part hereto, and read and construed as forming part of these presents The deed contained no mention of stock-in-trade. The inventor which was signed by the mortgagors on the same day as the de extended over twenty-one pages. The first twenty pages contai a detailed description of the engines and other chattels which w mentioned under general heads in the deed. At the bottom of page was this clause: "The stock-in-trade consists of bolts, brasswo wrought and cast iron work, brass and other work, both finish and in preparation." And at the top of page 21 were these word "Also all cast and wrought iron, steel, timber, and all other sto in-trade, in and upon the before-mentioned foundry, worksho and premises." Then came this clause: "The contents of twenty preceding sheets is a complete and exact inventory of fixtures, machinery, utensils, and things in, upon, or about foundry mortgaged by us this day." This was immediat followed by the signatures of the mortgagors. *Held*, that stock-in-trade was not included in the mortgage: *Ex p. Jard* (1875), L. R. 10 Ch. 322; 44 L. J. Bk. 58. Cf. *Mather* v. *Fra* (1856), 2 K. & J. 536; 25 L. J. Ch. 361; 110 R. R. 350.

Bill of sale.

A bill of sale was made of "all the goods, fixtures, etc. .

belonging to us and in and about the messuage . . . and the chief articles whereof are particularly enumerated and described in a certain schedule hereunto annexed," but the schedule was not annexed; it was held that the deed was operative without the schedule: *Dyer* v. *Green* (1847), 1 Ex. Ch. 71; 16 L. J. Ex. 239. See also *England* v. *Downs* (1840), 2 Beav. 522; 9 L. J. Ch. 313; *Baker* v. *Richardson* (1858), 6 W. R. 663.

Title.

Conveyance by husband and wife of all the messuages of them or either of them in certain counties, "all which said hereditaments were heretofore the estate and inheritance of" the wife. *Held*, that the husband's own property passed: *Youde* v. *Jones* (1844), 4 Sim. 131 (see p. 149).

Where there are two certain descriptions, old rule was that first could not be rejected.

It has been said that when there are two certain descriptions, the first shall necessarily prevail; but this appears not to be correct.

A bargain and sale of "all his tenements in the parish of St. Andrew in Holborn, in the occupation and tenure of W. G.," was held to pass nothing, as the vendor had nothing in the parish of St. Andrew, though he had property in St. Sepulchre in the occupation of W G. One of the points resolved was the following:—"First, that nothing passed by the said bargain and sale, for notwithstanding the latter certainty, *scil.* in the tenure of William Gardiner, was true, yet because the first certainty, *scil.* in the parish of St. Andrew in Holborn, was false, for this cause the bargain and sale was utterly void. But otherwise, had it been, if the true certainty had been in the first place, as if he had bargained and sold, 'the tenements, etc., in the tenure of William Gardiner in the parish of St. Andrew, Holborn,' there it was agreed that the tenements shall pass well enough notwithstanding the addition of the falsity for *utile per inutile non vitiatur*": *Dowtie's Case* (1584), 4 Rep. 9 b; *S. C. sub nom. The Duke of Northumberland's Case*, 3 Leon. 21; Shep. Touch. 247.

So it was held that a certain messuage passed, "for there was sufficient certainty before, and the falsity came after the verity": *Crapp's Case* (1590), 3 Leon. 235. And on motion for the amendment of a fine it was said "the present case differed from *Dowtie's* in the mode which that distinction required, for here the detailed one description came first," and the amendment was accordingly allowed: *Sidney, Demandant* (1815), 6 Taunt. 177. And Preston lays down the rule in the following terms: "It is a general rule that when the first and material circumstances of the description are true a false addition does not affect the validity of the grant": Prest. Conv. 449 (3rd ed.).

But this not now law.

In commenting on *Dowtie's Case*, Hobart says (*Stukeley* v. *Butler* (1614), Hob. 171): "But where it is added in that case that

the Court was of opinion that if he had begun with the tenure of C which was true, and ended with the parish mistaken, that t grant had been good by the rule *utile per inutile non vitiatur*: hold it plain contrary; for the several circumstances and descri tions circumscribe and ascertain the grant. And it is a good ru *incivile est nisi tota sententia perspecta de aliqua parte judicare* and he cites *Doddington's Case* (1594), 2 Rep. 32. See also She Touch. 247; 4 Cru. Dig. tit. xxxii. ch. 21, s. 59; *Windham Windham* (1851), Dyer, 376 b, where the mistaken part of t description preceded the correct part; and *Jack* v. *M'Intyre* (184 12 Cl. & F. 151; and *Rorke* v. *Errington* (1859), 7 H. L. C. 6 in both of which cases the misdescription was by omission in t first part of the description.

The limitation of the doctrine was maintained in argument the Court of Appeal in *Cowen* v. *Truefitt*, [1899] 2 Ch. 309; 68 L. Ch. 563, when *Wrotesley* v. *Adams* (1558), Plowd. 187, at p. 19 *Doe* v. *Galloway* (1833), 5 B. & Ad. 43, at p. 51; 2 L. J. K. B. 18 39 R. R. 381, and Shep. Touch. 247, were the only authorities ci in favour of the limitation. The decision of the Court turned up a different point, but the argument was dealt with in the judgme as follows :—

"I must, however, protest against the way in which the doctr was stated by the appellants' counsel—that the maxim '*Fa demonstratio non nocet*,' only applies when there is some incorr description at the end of the sentence. That is whittling aw the doctrine and making it ridiculous; it is a misapprehension *per* Lindley, M.R., *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309 p. 311. "I agree, however, that the doctrine is not to be down as was suggested by the appellants' counsel, by saying t it is to be limited to cases where the false part of the descript follows the true. That would be cutting down what is a ratio and useful canon of construction" : *per* Jeune, P., *ibid.*, at p. 3 "I altogether reject the argument, as my learned brothers h done, that in applying the doctrine of *falsa demonstratio* it material in what part of the sentence the *falsa demonstratio* found. To adopt such an argument would be to reduce a v useful rule to a mere technicality" *per* Rigby, L.J., *ibid.*, p. 313. *Eastwood* v. *Ashton*, [1915] A. C. 900, at p. 914; L. J. Ch. 671.

General descriptions following clear descriptions pass only what is *ejusdem generis*.

Where a description of property, sufficien clear to render it certain what is intended, followed by a general description, introduced by words "and also," or the like, it will be taken t the object of introducing the general descriptio

to guard against any accidental omission; and the general description will in most cases be held to comprise such property only as is *ejusdem generis* as that comprised in the specific description.

"It is very common to put in a sweeping clause; and the use and object of it, in general, is to guard against any accidental omission; but in such cases, it is meant to refer to estates or things of the same nature and description with those that have been already mentioned": *per* Lord Mansfield, C.J., *Moore* v. *Magrath* (1774), 1 Cowp. 9, at p. 12.

"It is a general rule of construction that, where a particular class is spoken of, and general words follow. the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class": *per* Pollock, C.B., *Lyndon* v. *Standbridge* (1857), 2 H. & N. 45, at p. 51; 26 L. J. Ex. 386; 115 R. R. 419, a case on a statute. See also *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490; 56 L. J. Q. B. 626; *Lee* v. *Alexander* (1883), 8 App. Cas. 853, at pp. 862, 867.

Examples. Lease.

Lease by a bishop of a manor house, of the site thereof, and of certain particular closes and demesnes, by particular names, and of all other his lands and demesnes. *Held*, that ancient park and copyhold land did not pass by the latter general words: *Lord North* v. *Bishop of Ely* (1757), cited 1 Bulst. 100.

Creditors' deed.

Assignment to creditors of "all and singular the household furniture, plate, linen, and china, stock-in-trade, goods, and merchandise, debts, sums of money, bills, notes, and securities for money, and all other the estate and effects whatsoever and wheresoever, of or to which A. was then possessed or entitled." *Held*, not to pass a contingent interest under a will: *Pope* v. *Whitcombe* (1825), 3 Russ. 124; 6 L. J. (o.s.) Ch. 53; 27 R. R. 32; followed in *Re Wright* (1852), 15 Beav. 367.

Deed declaring uses of recovery.

The C. property consisted of a mansion house and thirteen fields, and two mills with the lands belonging thereto. The tenant in tail, by deed declaring the uses of a recovery, recited his intention to convey the property thereinafter particularly mentioned, and he conveyed "all those the capital mansion house, messuage, or tenement, with the several out-offices, gardens, plantations, and hereditaments thereunto belonging, commonly called or known by the name of C.; And also those fields, closes, pieces, or parcels of land or ground and hereditaments (eight in number), commonly called or known by the several names, etc. (naming them), being parts and parcels of the demesne lands of C. in the holding or occupation of T. M., together with all and singular houses, out-

houses, edifices, buildings, etc., lands, meadows, etc., hereditamen and appurtenances whatsoever, to the said capital messuages, ten ments, lands, hereditaments, and premises belonging, or in an wise appertaining, or therewith or with any part or parcel there usually set, let, held, occupied, or enjoyed, or accepted, reputed taken or known for as (*sic*, *quaere* taken for, or known as) par parcel, or member thereof, or appurtenant thereto, or to any pa or parcel thereof." *Held*, that the previous particular enumeratio in the deed confined the operation of the subsequent general word and that the mansion house and eight fields only passed by th deed : *Doe* v. *Meyrick* (1832), 2 Cr. & Jer. 223; 2 Tyr. 178; 1 L. J. Ex. 373; 37 R. R. 687.

Voluntary settlement.

By indentures of lease and release, reciting that B was entitle to a share in specified freeholds and leaseholds, and that he propose to assign over all his interest in the aforesaid premises, and in suc other property situate in Great Britain or Ireland, whether re or personal, as he might at the time of executing the indenture b entitled to, for the benefit of his sisters, B released his undivide share in specified freeholds to the trustee and his heirs, and assigne to the trustee his undivided share in the leaseholds, "and all othe the property situate in Great Britain or Ireland or any part thereo whether real or personal," to which he was then entitled, upo certain trusts for the benefit of his sisters. B was at the time executing the deed entitled to a share of a freehold house no mentioned in the deed. *Held*, that it did not pass, because th general words had reference to the leaseholds only : *Doungsworth* v *Blair* (1837), 1 Keen, 795; 6 L. J. Ch. 263.

Mortgages.

A being seised of a manor and other real estate in the count of M., mortgaged the last-mentioned real estate to B; by a subs quent deed he mortgaged to C "all the hereditaments and premis comprised in the previous mortgage, and all other the land tenements, and hereditaments (if any) in the county of M.," which he was seised. *Held*, that the manor did not pass : *Rooke* v *Kensington* (1856), 2 K. & J. 753; 25 L. J. Ch. 795; 110 R. R. 45

Assignment by way of mortgage of "all and every the househol goods and furniture, stock-in-trade, and other household effec whatsoever, and all other goods, chattels and effects, now being, which shall hereafter be in, upon, or about the messuage, etc., an all other the personal estate whatsoever" of the mortgagor. *Hel* not to pass the lease of the house in which the goods were *Harrison* v. *Blackburn* (1864), 17 C. B. (N.S.) 678; 34 L. J. C. 109; 142 R. R. 580.

Charge of annuity.

Trustees, who had a power to raise money by sale or mortgag and to manage and receive rents, were directed to apply th "moneys to be raised or received as aforesaid," in or towar

payment, etc., of certain mortgage and other debts, and after providing for keeping down the interest on the debts out of "the rents and profits and other moneys in their hands," they were directed to pay an annuity out of the "rents or profits or any other moneys held by them on the trusts of these presents." *Held*, that the annuity was charged on income only, as the words "other moneys" must be restricted according to the rule, and would apply to fines and small things in the nature of income, not being exactly rents and profits: *Clifford* v. *Arundell* (1859), 27 Beav. 209; on appeal, (1860), 1 D. F. & J. 307; 125 R. R. 450.

Right of resumption.

A lease contained power to the landlord to take possession of any part of the land demised if required by him "for the purpose of building, planting, accommodation or otherwise." *Held*, that the words "or otherwise" were to be restricted to purposes *ejusdem generis*, and therefore did not authorise the landlord to take possession of the land for the purpose of selling it to a railway company: *Johnson* v. *Edgware, etc., Ry. Co.* (1866), 35 Beav. 480; 35 L. J. Ch. 322.

Power of attorney.

A power of attorney "for the purposes of exercising for me all or any of the powers and privileges conferred" by a partnership deed "and generally to do execute and perform any other act . . . in or about my concerns engagements and business of every nature and kind whatsoever," was held to be restrained to partnership matters, so that the attorney could not dissolve the partnership and assign the principal's share therein: *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422; 39 L. J. Q. B. 185; *Jacobs* v. *Morris*, [1901] 1 Ch. 261; [1902] 1 Ch. 816; 71 L. J. Ch. 363.

Disentailing deed.

A disentailing deed of freeholds "and all other if any freehold hereditaments subject" to the settlement, held insufficient to disentail funds in Court the proceeds of sale of hereditaments subject to the settlement: *Mills* v. *Fox* (1887), 37 Ch. D. 153; 57 L. J. Ch. 6.

Advowson.

A conveyance of all and singular the manors, messuages, farms, lands, hereditaments and premises described in the schedule thereunder written, and all other the freehold hereditaments of him, the said G. J. J., situate in the several parishes of D. W. and C., in the county of Y., with the appurtenances, was held not to include the advowson of the parish church of D.: *Crompton* v. *Jarratt* (1885), 30 Ch. D. 298; 54 L. J. Ch. 1109.

"Situate."

As to the meaning of the word "situate"—see *Crompton* v. *Jarratt* (*supra*) and *Re Ballinrobe and Claremorris Light Ry. Co. and Kenny*, [1913] 1 Ir. R. 519.

Fixtures.

So in a covenant to deliver up certain landlord's fixtures and all other fixtures and things at the expiration of a lease, it was held that trade fixtures, not being *ejusdem generis* as the fixtures enume-

rated, were not included in the covenant : *Lambourn* v. *McLellan* [1903] 2 Ch. 268; 72 L. J. Ch. 617; following *Bishop* v. *Elliot* (1855), 11 Exch. 113; 24 L. J. Ex. 229; 105 R. R. 421, 440.

Copyholds.

On the other hand a strip of copyhold land was held to pass by a conveyance of two fields containing about 22 acres, but the description was helped both by the acreage and the boundaries given in the deed : *Early* v. *Rathbone* (1888), 57 L. J. Ch. 652.

Reversion and estate in possession.

A reversion is *ejusdem generis* as an estate in possession within the meaning of the rule : *Doe* v. *Jeyes* (1830), 1 B. & Ad. 593; L. J. (o.s.) K. B. 82; 35 R. R. 390. But a reversion was held not to pass where if it had passed it would have been *ipso facto* forfeited : *Re Waley* (1855), 3 Drew. 165; 24 L. J. Ch. 499; 106 R. R. 304.

Context.

The context may readily show that the rule is not to be applied.

Creditors' deed.

In *Ringer* v. *Cann* (1838), 3 M. & W. 343; 7 L. J. Ex. 108; 4 R. R. 627, where the words were nearly the same as in *Harrison* v. *Blackburn* (1864), 17 C. B. (N.S.) 678, stated *supra*, p. 248, it was held that the lease passed, on the grounds, first, that from the nature of the transaction (it being a creditors' deed), the object must have been to pass everything of value; and secondly, that the deed contained a provision that the assignees should pay the rent for a limited period.

Exceptions.

There are two exceptions to this rule.

Exception of things not *ejusdem generis*.

First : where among general words something not *ejusdem generis* is mentioned by way of exception, this indicates that the general words are not to be restricted.

An assignment to creditors by a debtor of "all his stock-in-trade, book and other debts, goods, securities, chattels, and effects whatsoever, except the wearing apparel of himself and family." *Held*, to pass a contingent interest, on the ground that the exception of the wearing apparel showed that it was intended that all the assignor's property with that exception was intended to pass : *Ivison* v. *Gassiot* (1853), 3 D. M. & G. 958; 98 R. R. 389.

If first description is exhaustive.

Second : "If the particular words exhaust a whole genus, the general," [*i.e.*, "collective,"] "words must refer to some larger genus" : *per* Willes, J., *Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, at p. 315; 37 L. J. C. P. 78; citing *R.* v. *Payne* (1866), L. R. 1 C. C. R. 27.

Rule applied to statutes.

The rule has been applied to the construction of Acts of Parliament : see Maxwell on the Interpretation of Statutes, c. 11, s. 5 (6th ed.), pp. 583 *et seq.*

Certain kinds of carriers and travellers were specifically mentioned in two Acts of Parliament on the same subject, and the words "other persons whatsoever" also appeared. *Held*, that the specific description had the effect of excluding carriers not mentioned

Sandiman v. *Breach* (1827), 7 B. & C. 96; 5 L. J. (o.s.) K. B. 298; 31 R. R. 169.

Acts imposing rates on inhabitants of any "land, house, shop, warehouse, vault, mill, or other tenement" in a parish. *Held*, that the vicar was not rateable in respect of his tithes as an "other tenement": *R.* v. *Nevill* (1846), 8 Q. B. 452; 15 L. J. M. C. 33; 70 R. R. 538.

See also *East London Waterworks Co.* v. *Trustees for Mile End Old Town* (1851), 17 Q. B. 512; 21 L. J. M. C. 49; 85 R. R. 552; *Lyndon* v. *Standbridge* (1857), 2 H. & N. 45; 26 L. J. Ex. 386; 115 R. R. 419.

Where the terms of the description are general, and the instrument and mode of assurance are proper for conveying freeholds, *prima facie*, freeholds only will pass.

Freeholds only pass where the assurance is proper to pass them only.

This is the rule laid down by Mr. Preston (Shep. Touch. 92), but the cases cited by him—namely, *Rose* v. *Bartlett* (1632), Cro. Car. 292; *Day* v. *Trig* (1715), 1 P. Wms. 286; *Knotsford* v. *Gardiner* (1742), 2 Atk. 450—are all cases on wills. In *Edwards and Denton's Case* (1610), Godb. 183; *S. C. sub nom. Turpine* v. *Forreyner*, 1 Buls. 99, a case on a deed, the Judges expressed their opinion that the leasehold interest did not pass, but the decision turned on another point.

It appears to be clear that, on the one hand, the conveyance will not be held to pass leaseholds or copyholds where the result would be to create a forfeiture: Shep. Touch. 91; *Francis* v. *Minton* (1867), L. R. 2 C. P. 543; 36 L. J. C. P. 201; and that, on the other hand, it will pass leaseholds [or copyholds] where there are no freeholds which answer the description of the lands expressed to be conveyed: as in *Marshall* v. *Frank* (1717), Gilb. Eq. Rep. 143; Pre. Ch. 480; or where they have for some considerable time been holden with and deemed part of the estate described in the deed: *Doe* v. *Williams* (1788), 1 H. B. 25; 2 R. R. 703.

Copyholds.

Where the conveyance was of "all and every the estate, right, title, property and interest" of and in certain lands, a copyhold strip was held to pass, but the decision was helped by the acreage and boundaries given in the deed: *Early* v. *Rathbone* (1888), 57 L. J. Ch. 652.

Leaseholds passing as "personal property."

No general rule can be laid down as to whether leaseholds will pass by a general description of "personal property." The principal cases are *Ringer* v. *Cann* (1838), 3 M. & W. 343; 49 R. R. 627; *Doe* v. *Howe* (1840), 9 L. J. Q. B. 352; 52 R. R. 591; *Harrison* v. *Blackburn* (1864), 17 C. B. (N.S.) 678; 34 L. J. C. P. 109; 142

R. R. 580; *Hopkinson* v. *Lusk* (1865), 34 Beav. 215; 145 R. R. 480; *White* v. *Hunt* (1870), L. R. 6 Ex. 32; 40 L. J. Ex. 23; *Debenham* v. *Digby* (1873), 28 L. T. 170.

Mortgage sub-term.

An assignment, by the executors of a mortgagee of leaseholds by demise, of "all the benefit of the said mortgage" to one of themselves was held insufficient to pass the legal interest in the sub-term: *Re Beachey; Heaton* v. *Beachey*, [1904] 1 Ch. 67; 73 L. J. Ch. 68.

What passes by a conveyance of land.

A conveyance of land includes *supra et infra*: Shep. Touch. 90.

"It has been settled by authority that the stratum of air lying above land passes with the land. Upon a purchase of the fee simple of the land the space *usque ad coelum* passes with the conveyance: *per* Buckley, J., *Andrews* v. *Abertillery Urban Council*, [1911] 2 Ch. 398, at p. 413; 80 L. J. Ch. 724.

Thus, trade fixtures will pass: *Re Yates* (1888), 38 Ch. D. 112; 57 L. J. Ch. 697, but if there is a separate assignment of them as chattels, the grantee cannot set up a title to them as passing by the grant of the land: *Ex p. Daglish, re Wilde* (1873), L. R. 8 Ch. 1072; 42 L. J. Bk. 102; *Small* v. *National Provincial Bank of England*, [1894] 1 Ch. 686; 63 L. J. Ch. 270; *Johns* v. *Ware*, [1899] 1 Ch. 359; 68 L. J. Ch. 155.

It is a presumption of law that—

Conveyance of land passes half soil of highway.

> A conveyance of land abutting on a highway, or a non-tidal river, passes the adjoining half of the highway, or of the river bed.

Presumption may be rebutted.

The presumption may be rebutted, but it is not rebutted (i) by the land being described as containing an area which can be satisfied without including half the road or river bed; (ii) by the land being described as bounded by the road or river bed; (iii) by the land being referred to as coloured on a plan, whereon the half of the road or river bed is not coloured; (iv) by the grantor being owner of the land on both sides of the road or river; or (v) because subsequent events not contemplated at the time of the grant show it to have been very disadvantageous to the grantor to have parted with the half of the road or river bed, but which if contemplated would probably have induced him to reserve it.

"It is a well-settled rule of construction that, where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side by a public thoroughfare, then half of the road passes unless there is enough in the expressions of the instrument or in the surrounding circumstances to show that this is not the intention of the parties": *per* Swinfen Eady, J., *Central London Ry.* v. *City of London Land Tax Commissioners*, [1911] 1 Ch. 467, at

). 474; 80 L. J. Ch. 348, and see [1911] 2 Ch. 467, at p. 474; 81 L. J. Ch. 20 (on appeal, the case being reversed on a point not material here); *Thames Conservators* v. *Kent*, [1918] 2 K. B. 272, at p. 284; *Maclaren* v. *Att.-Gen. for Quebec*, [1914] A. C. 258, at p. 273; 83 L. J. P. C. 201.

A railway is not a highway within this proposition: *Thompson* v. *Hickman*, [1907] 1 Ch. 550; 76 L. J. Ch. 254.

As to the right of access to a highway enjoyed by an owner of premises adjoining the highway: *Cobb* v. *Saxby*, [1914] 3 K. B. 322; 83 L. J. K. B. 1817.

"Stratum."

A conveyance of "surface" or a "stratum" passes only such a stratum: *Andrews* v. *Abertillery Urban Council*, [1911] 2 Ch. 398, at pp. 406, 407, 412, 413 and 415; 80 L. J. Ch. 724.

Abuttals insufficient.

"It appears to me that a conveyance of land, described as abutting on a road, passes a moiety of the soil of the road, unless there be something in the context to exclude it. It is like the case put in Rolle's Abridgment, Graunts (P.), pl. 6, 'Si home grant un messuage vocatum Falstolfe Place, *prout undeque includitur aquis*, per ceux parolls le soile del motes en que le ewe est passera; P. 9 Car. B. R. (1633), enter *Stint & Morgan*, per Curiam, resolve sur un trial al barr.' And this received the assent of Chief Baron Comyns; see Com. Dig., Grant (E. 6)": *per* Willes, J., *Simpson* v. *Dendy* (1860), 8 C. B. (N.S.) 433, at p. 472; 125 R. R. 725.

Measurement insufficient.

"I am of opinion that, where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance": *per* Erle, C.J., *Berridge* v. *Ward* (1861), 10 C. B. (N.S.) 400, at p. 415; 30 L. J. C. P. 218; 128 R. R. 764.

Abuttals insufficient.

"I quite agree that where there is a plot of land conveyed adjoining to a road or river, the *prima facie* presumption is, that up to the *medium filum aquae* or *viae*, whichever it may be, belongs to the purchaser. And it is not enough to rebut that presumption to say that it is designated as adjoining to or abutting on that road or river, and this even if there was mention of the acreage. But . . it has always been held to be enough" [*i.e.*, to rebut that presumption] "when there is anything to show that it was not the intention to convey any part of the road": *per* Blackburn, J., *Plumstead Board of Works* v. *British Land Co.* (1874), L. R. 10 Q. B. 16, at p. 24; 44 L. J. Q. B. 38.

"The authorities adverted to in the course of the argument establish, as a general rule of construction, that where land adjoining a highway or inland river is granted, the *prima facie* presumption is that the parties intended to include in the grant a

moiety of the road or of the river bed, as the case may be; an that such general presumption ought to prevail, unless there something to indicate a contrary intention; . . . and the author ties seem further to establish that this general presumption is n to be considered as rebutted by this circumstance alone, that th subject of the grant is described as abutting on or bounded by th road or river, or that the quantity of land specifically described granted is satisfied without including the half of the road or rive or that the grant refers to a map or plan in which the half of th road or river is not included. To rebut the general presumptio there must be something in the language of the grant indicating a intention to exclude [or] something in the subject-matter or in th surrounding circumstances from which such an intention ma reasonably be inferred" : *per* Fitzgerald, J., *Dwyer* v. *Rich* (1871 Ir. Rep. 6 C. L. 144, at p. 149; and see *per* Lord Cranworth, C *Wishart* v. *Wyllie* (1853), 1 Macq. 389, which was apparently n a case on the construction of a deed.

Reference to map insufficient.

"There may be facts, whether appearing on the face of th conveyance or not, from which it is justly inferred that it was n the intention of the parties that the general presumption shou apply, but in my opinion it is not sufficient that circumstanc which afterwards occur show it to be very injurious to the grant that the conveyance should include half of the bed of the river o half the soil of the road" : *per* Cotton, L.J., *Micklethwait* v. *New lay Bridge Co.* (1886), 33 Ch. D. 133, at p. 145.

Subsequent events insufficient.

"The grant is of land delineated in a plan and therein colour pink and described by quantity and as abutting on the north on th river Aire. Neither the colouring on the plan nor the quantit named includes the half bed of the river. When we come t apply the ordinary and well-settled rules of law to that conveyanc we find it settled by authority which it is impossible for us to igno or overrule, that those circumstances as to colouring and quantit do not alone prevent a moiety of the bed of the river fro passing" : *per* Lindley, L.J., *ibid.*, at p. 152, in which case th grantor was, at the time of the grant, owner of both banks of th river.

Ownership of both banks insufficient.

Cases where presumption rebutted.

Grant to a railway company.

The presumption was rebutted in a case where the conveyanc was to a railway company purchasing under their statutory powe on the grounds that before the conveyance the company had i their deposited plans and book of reference treated the road a being vested in turnpike trustees, and that "the conveyance exactl carried out that view of the case" : *The Marquis of Salisbury* v *The Great Northern Ry. Co.* (1858), 5 C. B. (N.S.) 174; 28 L. J C. P. 40; 116 R. R. 619.

Market place.

The presumption was rebutted in the case of The Briggate

eds, which is a very wide street in which fairs and markets (for ich tolls were received) had been used to be held, and, in respect laying pipes and of encroachments in which, the lords of the anor had received rents and fines: *Beckett* v. *Corporation of eds* (1872), L. R. 7 Ch. 421.

Building estate.

The presumption was rebutted in a case where the land sold rmed part of a building estate, and the plots sold were "pointedly d carefully marked out so as to include no part of the road at l and separated from it by a strong line": *Plumstead Board of orks* v. *British Land Co.* (1874), L. R. 10 Q. B. 16; 44 L. J. Q. B. ; but this case was reversed on appeal ((1875), L. R. 10 Q. B. 3) on a different point, and no opinion was given on the correctss of the decision on the point stated.

Intended roads.

The presumption was rebutted in a case where the conveyance as of a plot of land laid out for building and the road in question as described in the conveyance as an intended road, on the ground at it was obviously necessary that the grantor should retain e soil of the intended road in order that he might construct e road and dedicate it to the public: *Leigh* v. *Jack* (1879), 5 x. D. 264; 49 L. J. Ex. 220.

Grassy lane.

The presumption was also rebutted where the road, which was parately numbered in the ordnance map, and was a grassy lane which were some trees, was not included in the schedule to e conveyance, which referred to the numbers on the ordnance ap, and on evidence that the grantee had paid for the trees on e land, but not for those growing in the road: *Pryor* v. *Petre*, 894] 2 Ch. 11; 63 L. J. Ch. 531.

Fishery.

The presumption was also rebutted, where it was proved that at e date of the conveyances a fishery in the river had been for any years and still was in lease to tenants as a separate tenement: *uke of Devonshire* v. *Pattinson* (1887), 20 Q. B. D. 263; 57 L. J. B. 189; and where the grant was an inclosure award and there as at the date of the award a several fishery in the river let as a parate tenement, and there was no evidence that the tenants had y right of fishing or commonable right over the bed, which conquently did not form part of the wastes: *Ecroyd* v. *Coulthard*, 897] 2 Ch. 554; 66 L. J. Ch. 751; [1898] 2 Ch. 358; 67 L. J. Ch. 8, in which case an opinion was expressed that the presumption es not apply to awards under Inclosure Acts unless it is shown at the bed of the river or half the bed is part of the waste of the anor over which the tenants have rights of common, *per* North, J., 897] 2 Ch., at p. 568, *per* Lindley, M.R., [1898] 2 Ch., at p. 366, r Chitty, L.J., *ibid.*, at p. 371, and *per* Collins, L.J., *ibid.*, at 375; but see to the contrary the *dictum* in the judgment of ndley, L.J., in *Hindson* v. *Ashby*, [1896] 2 Ch. 1, at p. 9; 65

Inclosure awards.

L. J. Ch. 515; and cf. *Great Torrington Commons Conservators* v. *Moore Stevens*, [1904] 1 Ch. 347; 73 L. J. Ch. 124, a case on private Inclosure Act. And see *per* Farwell, J., *Central Lond Ry.* v. *City of London Land Tax Commissioners*, [1911] 2 467, at p. 481; 81 L. J. Ch. 20.

Islands. The presumption so far as regards river beds only applies land covered by water. There is no presumption that anci islands pass, and in cases where there are such islands the mid of the river bed is the *medium filum* between the shore and t island: *Great Torrington Commons Conservators* v. *Moore Steve* [1904] 1 Ch. 347; 73 L. J. Ch. 124.

Sea-grounds. A grant of "all that and those the sea-grounds, oyster-layin shores and fisheries" of the grantor. *Held*, that the right of soil the seashore between high- and low-water mark passed to t grantees: *Scratton* v. *Brown* (1825), 4 B. & L. 485; 28 R. R. 3

Lakes. The presumption seems not to apply to inland navigable lak at least in Crown grants: *Bloomfield* v. *Johnson* (1867), Ir. R. C. L. 68.

Tidal rivers. There is no presumption that the ownership of the bed o tidal river goes with the ownership of the adjoining soil, a therefore in Crown grants of land on tidal rivers, *prima facie* t boundary is high-water mark, though evidence might show th the soil betwen high- and low-water mark, or the bed below lo water mark, passed by the description of the land: see Coulson a Forbes on the Law of Waters (4th ed.), p. 90.

Streets in towns. The presumption applies to streets and roads in towns as well elsewhere: *Re White's Charities; Charity Commissioners* v. *Lond Corporation*, [1898] 1 Ch. 659; 67 L. J. Ch. 430; *London and Nor Western Ry. Co.* v. *Westminster Corporation*, [1902] 1 Ch. 269; L. J. Ch. 34; [1904] 1 Ch. 759, notwithstanding the dou expressed on this point in the head-note to *Beckett* v. *Corporati of Leeds* (1872), L. R. 7 Ch. 421, the judgments in which cas however, afford but slight grounds for such doubt.

Rights of local authorities. And the statutes by which streets are vested in local authoriti vest in them "such property only as is necessary for the contr protection and maintenance of the street as a highway for pub use": *per* Lord Herschell, *Mayor, etc., of Tunbridge Wells* *Baird*, [1896] A. C. 434, at p. 442; 65 L. J. Q. B. 451; therefor neither does the sub-soil vest in them *usque ad inferos: ibid.*; n the air above *usque ad coelum: Finchley Electric Light Co.* *Finchley Urban District Council*, [1903] 1 Ch. 437; 72 L. J. C 297.

Pathway. The presumption applies to a pathway as well as a road: *Ber and Goodman's Case* (1588), 2 Leon. 147, where it is stated th "the jury found that one side of the pathway was the land of t

arson of the church, and the other side the churchyard, and ayed the opinion of the Court therein, to whom the interests of the athway did belong; to which it was said by the Court that that ight to be found by the verdict, for although that both be the eehold of the parson yet the soil of the pathway might be conyed by an express grant unto another. But the Court seemed to cline that the soil of the pathway did belong to him who had the nds on both sides, and that is the case as well of a highway of a pathway," which must mean that the ordinary presumption plies.

Private roads.

The presumption applies to private as well as public roads.

"The same principle which applies in the case of a public road, d which is the foundation of the doctrine, seems to me to apply ith equal force to the case of a private road. That presumption allowed to prevail upon grounds of public convenience, and to event disputes as to the precise boundaries of property, and it is sed upon this supposition—which may be more or less founded in ct, but which at all events has been adopted—that when the road as originally formed the proprietors on either side each conibuted a portion of his land for the purpose. I think that is equally convenient and reasonable principle whether applied to public or to a private road": *per* Cockburn, C.J., *Holmes* v. *ellingham* (1859), 7 C. B. (N.S.) 329, at p. 336; 29 L. J. C. P. 2, at p. 134; 121 R. R. 515, which, however, is not a case on the nstruction of a deed.

The same principle was asserted in *Smith* v. *Howden* (1863), 14 B. (N.S.) 398; 135 R. R. 746; also not a case on construction.

Crown grants.

The presumption applies to a Crown grant, at any rate in the lonies: *Lord* v. *Commissioners of the City of Sydney* (1859), 12 oo. P. C. 473; 124 R. R. 113.

Copyholds.

"The general law, as I have stated it" (*sc.* that a grant of land the bank of a river passes half the soil of the bed), "is not a law ich relates to freehold property only. It is a law by which you certain the parcel of a grant. It does not matter whether the d is copyhold, freehold, or leasehold": *per* Kay, J., *Tilbury* v. *va* (1890), 45 Ch. D. 98, at p. 109. See *infra*, p. 259.

Leaseholds.

The presumption that the soil to the middle of the highway longs to the owner of the adjoining close applies to leaseholds: *per* Holroyd, J., *Doe* v. *Pearsey* (1827), 7 B. & C. 304, at 307; 9 D. & R. 908; 5 L. J. (O.S.) K. B. 310; 31 R. R. 209.

Leases.

A lease of houses in a street containing no express demise of the *ad medium filum viae*, was held to include the soil *ad medium m*, so that the demised houses could be said to be contiguous to houses on the opposite side of the street, construing "conuous" strictly as "touching": *Haynes* v. *King*, [1893] 3 Ch.

439; 63 L. J. Ch. 21. But the question was treated as being a open one in *Mappin Brothers* v. *Liberty & Co.*, [1903] 1 Ch. 11 where it was held that if there was such a presumption it w rebutted.

If grantor owns more than half.

Where it is shown that of the two owners of lands abutting either side of the highway, one is owner of more or less than on half in width of the soil of the highway, then the presumption that by his conveyance such owner grants the whole of that part the soil of the highway which belongs to him : *Re White's Charitie Charity Commissioners* v. *London Corporation*, [1898] 1 Ch. 65 67 L. J. Ch. 430.

Small strips of uninclosed land.

The same presumption applies to small strips of uninclos land lying between the land conveyed and the highway. "T ordinary presumption of law, as appears from the cases, is th small strips of land lying between old inclosures and the highw belong to the owners of the adjoining old inclosures. . . . Now t presumption of ownership being, as I have already observed, it quite consistent with the language of this conveyance that it shou vest in the grantee the soil of the road *usque ad medium filum*, when the lord in whom was the freehold on both sides conveys t land on one side describing it as abutting on Hall Lane, the presu ably right construction of the deed is that it passes to the grant the soil *ad medium filum viae*": Erle, C.J., *Simpson* v. *Den* (1860), 8 C. B. (N.S.) 433, at pp. 469, 470; 125 R. R. 725; affirm on appeal (1861), 7 Jur. (N.S.) 1058.

Copyholds or leaseholds.

"As to the property granted, a copyholder stands in the place the lord, the leaseholder in the place of the lessor. It is ve improbable that when a lease or grant is made of land near the hi road, and there is between the highway and the land inclosed small quantity of uninclosed land, of little or no use to the lord lessor, that he should separate it from the rest, or reserve to hims such land. When a grant of land near to a road is made (ev where it is inclosed and separated from the land adjoining), appears to me that the *prima facie* presumption is, that the land, that side of the fence on which the road is, passes likewise with Generally speaking, where an inclosure is made, the party maki it erects his bank and digs his ditch on his own ground, on t

Ditches.

outside of the bank. The land which constitutes the ditch point of law is a part of the close, though it be on the outside the bank. And if something further is done for his own convenier when that which constitutes the fence is dug out from his land, for instance, if a small portion of uninclosed land near a public private way is left out of the inclosure to protect and secure t occupation of that part of the land which is inclosed, that, in po of law, is a part of the close on which the inclosure is made.

y grant of such land, being copyhold, had been made before the closure, the subsequent grants would probably continue to be ade in the same way, notwithstanding the inclosure, and all the nd, both within and without the inclosure, would, therefore, pass those grants. It seems to me, therefore, that the rule that waste nd near a highway is to be presumed *prima facie* to belong to the ner of the inclosed land next adjoining, is not confined to a case here the owner of that land is a freeholder, but extends equally to ses where the owner is a leaseholder or a copyholder. In either se evidence may be given to rebut the *prima facie* presumption" : r Holroyd, J., *Doe* v. *Pearsey* (1827), 7 B. & C. 304, at pp. 307, 8; 9 D. & R. 908; 5 L. J. (o.s.) K. B. 310; 31 R. R. 209.

Strips near commons.

The presumption that uninclosed strips between the enclosures d the highway belong to the owners of the adjoining enclosures es not apply where such strips are contiguous to or communicate th open commons or larger pieces of uninclosed land, and it ould probably be held that a grant by the owner of a close to hich such a strip was adjacent would not pass the soil of such rip on the ground that the tenants of the manor had rights ereover, but there seems to be no case on the point.

"*Prima facie* the presumption is that a strip of land, lying tween a highway and the adjoining close, belongs to the owner of e close; as the presumption also is that the highway itself, *medium filum viae*, does. But the presumption is to be confined that extent; for if the narrow strip be contiguous to, or communicate with, open commons, or larger portions of land, the esumption is either done away or considerably narrowed" : *per* bbs, C.J., *Grose* v. *West* (1816), 7 Taunt. 39, at p. 41; 17 R. R. 7; see also *Simpson* v. *Dendy*, *supra*.

Modern grant by copy.

Although the presumption, that the soil to the middle of the ghway belongs to the owner of the adjoining close, applies to cient copyholds, a modern grant of an enclosure by the lord of a nor to hold by copy of court roll does not pass the soil of the ghway, and it is doubtful whether it passes the soil of any ervening uninclosed strip of land.

See now L. P. A. 1922, Pt. V.

"If the road existed at the time when the copyhold was first nted, viz., from time immemorial, the right of property in the d and the waste land adjoining might in that case have nained in the lord" : *per* Bayley, J., *Doe* v. *Pearsey*, *supra*, at 306; 9 D. & R. 908, at p. 909. And in the case of *Marquis of isbury* v. *Great Northern Ry. Co.* (1858), 5 C. B. (N.S.) 174, which it was held that the soil of the road did not pass by grant of roadside waste as copyhold, Williams, J., says (at 209): "We must look to the intention—Did he or did he intend to pass to the grantee any rights which he had in

the soil of the road? When we find that the piece of land granted was to be held of the lord as part of the copyhold the manor, it seems to me to be impossible to say that was intended to convey anything but the right to the very pi of land granted, the right to the soil of the adjoining road be left as it was."

Right of way by estoppel.

A grant or lease of land described as abutting on a new road street passes to the grantee by estoppel a right of way over su new road or street for all its length: *Roberts* v. *Karr* (1809) Taunt. 495; 10 R. R. 592; followed in *Cooke* v. *Ingram* (1893), L. T. 671; *Harding* v. *Wilson* (1823), 2 B. & C. 96; 26 R. R. 28 *Espley* v. *Wilkes* (1872), L. R. 7 Ex. 298; 41 L. J. Ex. 2 approved in *Furness Ry.* v. *Cumberland Co-operative Build Society* (1885), 52 L. T. 144; 49 J. P. 292, and cited in *Gogarty* *Hoskins*, [1906] 1 Ir. R. Ch. 173, at p. 181; *International T Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165, at p. 173; 72 L. J. Ch. 5 *Rudd* v. *Bowles*, [1912] 2 Ch. 60; 81 L. J. Ch. 277.

Presumed grant.

As to the presumed grant in a case where water flowed through artificial channel past the lands of several proprietors with the obj of serving a proprietor further down stream, see *Whitmores* v. *Sta ford*, [1909] 1 Ch. 427; 78 L. J. Ch. 144. See also *Lewis* *Meredith*, [1913] 1 Ch. 571; 82 L. J. Ch. 255; *Baily & Co.* *Clark, Son and Morland*, [1902] 1 Ch. 649; 71 L. J. Ch. 396.

Party-wall.

A grant, by the owner of two houses separated by a wall, of c of the houses passes an undivided moiety of such wall so that owners of the houses are tenants in common thereof. "When builder of two houses grants off one it is more reasonable to p sume he grants the whole wall in undivided moieties than th he should leave to either party the power of cutting the wall half. That would be the case if the houses were built by one a the same person. If two persons built at the same time probability is that they would take a conveyance of an undivic moiety of the ground on which the wall was to be erected in orc that the property might afterwards be kept in the same state *per* Bayley, J., *Wiltshire* v. *Sidford* (1827), 1 Man. & Ry. 404 p. 407; (6 L. J. (o.s.) K. B. 151; 31 R. R. 329). "If a row houses is built and the owner of the whole conveys separate hou to different persons, does not an undivided interest in the wh party-wall pass?" *per* Holroyd, J., *ibid.*, at p. 406.

A declaration in the grant that the wall is to be a party-w makes the adjoining owners tenants in common: *Watson* v. *Gr* (1880), 14 Ch. D. 192; 49 L. J. Ch. 243.

A party-wall can be partitioned vertically and longitudinall *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508; 63 L. J. C 399.

The cases as to meaning of the word "party-wall" are: *Matts Hawkins* (1813), 5 Taunt. 20; 14 R. R. 695; *Cubitt* v. *Porter* 828), 8 B. & C. 257; 6 L. J. (o.s.) K. B. 306; 32 R. R. 374; *Sted-an* v. *Smith* (1857), 8 E. & B. 1; 26 L. J. Q. B. 314; 112 R. R. 6; *Weston* v. *Arnold* (1873), L. R. 8 Ch. 1084; 43 L. J. Ch. 123; *andard Bank of British South Africa* v. *Stokes* (1878), 9 Ch. D. ; 47 L. J. Ch. 554; *Knight* v. *Pursell* (1879), 11 Ch. D. 412; 48 J. Ch. 395; and *Drury* v. *Army and Navy Auxiliary Co-operative pply, Ltd.*, [1896] 2 Q. B. 271; 65 L. J. M. C. 169; *London, oucestershire and North Hants Dairy Co.* v. *Morley*, [1911] 2 . B. 257, 1143; 80 L. J. K. B. 908, 1361 (a case on the London uilding Act, 1894).

As to a demise of "rooms," see *Carlisle Café Co.* v. *Muse Bros., td.* (1897), 67 L. J. Ch. 53; 77 L. T. 515; 46 W. R. 107; *Hope ros., Ltd.* v. *Cowan*, [1913] 2 Ch. 312; 82 L. J. Ch. 439; *Goldfoot Welch*, [1914] 1 Ch. 213; 83 L. J. Ch. 360. "Rooms."

Where under a disposition or other arrangement which, if a olding in undivided shares had been permissible, would have eated a tenancy in common, a wall or other structure is or is xpressed to be made a party-wall or structure, that structure shall e and remain severed vertically as between the respective owners, d the owner of each part shall have such rights to support and er over the rest of the structure as may be requisite for conferring ghts corresponding to those which would have subsisted if a valid nancy in common had been created: section 38, sub-section 1, aw of Property Act, 1925. See also paragraph 1, Part V, First hedule to that Act. **New Law.**

No special words are necessary for the creation of a profit *à prendre*. Creation of profit *à prendre*.

A profit *à prendre* was created by the words, "Provided always, d it is hereby covenanted, granted, concluded and agreed, and and B. covenant and grant to and with C., his heirs and signs, that it shall be lawful for C., his heirs and assigns, to ke and dig, etc.": *Lord Mountjoy's Case* (1852), Moore, 197; And. 307; *S. C. sub nom. Huntingdon and Mountjoye's Case*, 4 on. 147; *sub nom. Mountjoy and Huntingdon's Case*, Godb. 17. Mining.

A grant by deed of the exclusive right of fishing is a profit *prendre* and not a mere licence: *Fitzgerald* v. *Firbank*, [1897] Ch. 96; 66 L. J. Ch. 529; and so is a mere agreement of tenancy sporting rights for a year: *Lowe* v. *Adams*, [1901] 2 Ch. 598; 70 J. Ch. 783. Fishing.

A grant of the "profit" of land is a grant of the land: Co. t. 4 b.

Building lease.

A building lease gives the lessee the right to appropriate su soil as he removes for the purpose of the building: *Robinson* *Milne* (1884), 53 L. J. Ch. 1070.

Profit *à prendre* is *prima facie* non-exclusive,

A grant of a profit *à prendre* is *prima facie* no exclusive.

The chief authorities for this proposition are Co. Litt. 4 b; *L.* *Mountjoy's Case* (1582), Moore, 197; 1 And. 307; *S. C. sub no* *Huntingdon and Mountjoye's Case*, 4 Leon. 147; *sub no* *Mountjoy and Huntingdon's Case*, Godb. 17; *Chetham* v. *Willia* *son* (1804), 4 East, 469; *Newby* v. *Harrison* (1861), 1 J. & H. 3 at p. 396; 128 R. R. 437; *Carr* v. *Benson* (1868), L. R. 3 Ch. 5 at p. 532; *Duke of Sutherland* v. *Heathcote*, [1891] 3 Ch. 5 60 L. J. Ch. 841; [1892] 1 Ch. 475; 61 L. J. Ch. 248. B

but may be exclusive.

notwithstanding the *dicta* in Co. Litt. 4 b, and in some of reports of *Lord Mountjoy's Case* (*ubi sup.*), such a grant may exclusive: *Harker* v. *Birkbeck* (1764), 3 Burr. 1556; *Wilson* *Mackreth* (1766), 3 Burr. 1824; the cases above referred to; a *Doe* v. *Wood* (1819), 2 B. & Ald. 724, at p. 739; 21 R. R. 4

No profit *à prendre* without capable grantee.

There cannot be the grant of a profit *à prendre* without a capa grantee. A series of residents in a house are not capable grantee *Westropp* v. *Congested Districts Board*, [1919] 1 Ir. R. (H. L. Ir.).

As to the distinction between a licence and a profit *à prend* see Key & Elphinstone (12th ed.), Vol. I, Pt. I, 351.

Creation of easements.

No special words are necessary for the creati of an easement.

"It is undoubted law that no particular words are necessary a grant; and any words which clearly show the intention to g an easement which is by law grantable, are sufficient to effect t purpose": *per* Lord Wensleydale, *Rowbotham* v. *Wilson* (1860) H. L. C. 348, at p. 362; 30 L. J. Q. B. 49; 125 R. R. 192, in wh case it was decided that a right to injure the surface of land underground workings was an easement. An easement was crea by the words "A grants and agrees with B, his heirs and assig that it shall be lawful for them at all times to have, &c.": *Hol* v. *Seller* (1691), 3 Lev. 305.

Rights of way.

Many of the cases on the construction of deeds relating to rig of way are cases of so-called exception or reservation; but construction of such reservations is similar to that of grants, "it is to be observed that a right of way cannot in strictness made the subject of exception or reservation. It is neither par of the thing granted, nor is it issuing out of the thing grant

ne former being essential to an exception, and the latter to a eservation. A right of way *reserved*, using that word in a somewhat popular sense, to a lessor, as in the present case, is in trictness of law an easement newly created by way of grant rom the grantee or lessee": *per Tindal*, C.J., *Durham and underland Ry. Co.* v. *Walker* (1842), 2 Q. B. 940, at p. 967; 7 R. R. 842.

New Law.

(1) The only legal easements that can exist after 1925 are those n or over land for an interest equivalent to an estate in fee simple n possession or a term of years absolute. Any other easements re equitable only: section 1, sub-sections 2 and 3, Law of Property Act, 1925.

(2) Formerly a reservation of a legal estate was only possible f (a) the grantee of the legal estate out of which the reservation was made executed the deed, or (b) the reservation was by way of use. The Statute of Uses (as amended) has been repealed, and after 1925 no such execution as aforesaid is necessary: section 65, Law of Property Act, 1925. See also p. 439 and pp. 492 *et seq.*, Key & Elphinstone (12th ed.), Vol. I, Pt. I.

(3) Legal easements shall enure for the benefit of the land to which they are intended to be annexed and may be held by persons n common: section 187, Law of Property Act, 1925.

Extent of rights of way depends on nature of road and purpose of grant.

The nature and extent of a right of way must, in the absence of express terms contained in the grant, depend on the nature of the road over which it is granted, and the purpose for which it is intended to be used.

"The grant of a right of way *per se* and nothing else may be a right of footway, or it may be a general right of way, that is, a right of way not only for people on foot, but for people on horseback, for carts, carriages, and other vehicles. Which it is, is a question of construction of the grant, and that construction will, of course, depend on the circumstances surrounding, so to speak, the execution of the instrument. Now, one of those circumstances, and a very material circumstance, is the nature of the *locus in quo* over which the right of way is granted. If we find a right of way granted over a metalled road, with pavement on both sides, existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage, not only of foot passengers, but of horsemen and carts. Again, if we find the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the

face of the grant to be intended to be used or to be actually us for a purpose which would necessarily or reasonably require t passing of carriages, there again it must be assumed that the gra of the right of way was intended to be effectual for the purpo for which the place was designed to be used or was actually use Where you find a road constructed so as to be fit for carriages, a of the requisite width, leading up to a dwelling-house, and the is a grant of right of way to that dwelling-house, it would be grant of a right of way for all reasonable purposes required for t dwelling-house, and would include therefore the right to the us of carriages by the occupant of the dwelling-house if he wanted take the air, or the right to have a waggon drawn up to the do when the waggon was to bring coals for the use of the dwellin house. Again, if the road is not to a dwelling-house but to factory or a place used for business purposes, which would requi heavy weights to be brought to it, or to a wool warehouse, whi would require bags or packages of wool to be brought to it, th a grant of right of way would include a right to use it for reasonab purposes sufficient for the purposes of the business, which wou include the right of bringing up carts and waggons at reasonab times for the purpose of the business. That again would afford a indication in favour of the extent of the grant. If, on the oth hand, you find that the road in question over which the grant w made was paved only with flagstones, and that it was only fo or five feet wide, over which a waggon or cart or carriage ordinari constructed could not get, and that it was only a way used to field or close, or something on which no erection was, there, I ta it, you would say that the physical circumstances showed that th right of way was a right for foot passengers only. It might inclu a horse under some circumstances, but could not be intended f carts or carriages. Of course, where you find restrictive words the grant, that is to say, where it is only for the use of fo passengers, stated in express terms, or for foot passengers a horsemen, and so forth, there is nothing to argue. I take it th is the law. *Prima facie* the grant of a right of way is the gra of a right of way having regard to the nature of the road ov which it is granted and the purpose for which it is intended to b used; and both those circumstances may be legitimately calle in aid in determining whether it is a general right of way or right of way restricted to foot passengers, or restricted to fo passengers and horsemen or cattle, which is generally called drift-way, or a general right of way for carts, horses, carriages, a everything else" : *per* Jessel, M.R., *Cannon* v. *Villars* (1878 8 Ch. D. 415, at pp. 420, 421; 47 L. J. Ch. 597.

The question whether a right of way is limited to purposes f

Not limited to purposes required at time of grant.

hich access was required at the time of the grant to the land to hich it is appurtenant, is one on which there has been much fference of opinion, but probably the better opinion is "that here there is an express grant of a private right of way to a rticular place, to the unrestricted use of which the grantee is titled, the grant is not to be restricted to access to the land for e purposes for which access would be required at the time of the ant" : *per* Stephen, J., *Finch* v. *G. W. Ry.* (1879), 5 Ex. D. 254, p. 261.

In the judgment in that case, *Allan* v. *Gomme* (1840), 11 A. & . 759; 9 L. J. Q. B. 258; 52 R. R. 492; *Henning* v. *Burnet* (1852), Exch. 187; 22 L. J. Ex. 79; 91 R. R. 427; *Skull* v. *Glenister* 864), 16 C. B. (N.S.) 81; 33 L. J. C. P. 185; 139 R. R. 419; *illiams* v. *James* (1867), L. R. 2 C. P. 577; 36 L. J. C. P. 256; *nited Land Co.* v. *G. E. Ry. Co.* (1873), L. R. 17 Eq. 158; 43 J. Ch. 363; (1875), L. R. 10 Ch. 586 (followed in *White* v. *Grand otel, Eastbourne, Ltd.*, [1913] 1 Ch. 113; 82 L. J. Ch. 57); and *ewcomen* v. *Coulson* (1876-7), 5 Ch. D. 133; 46 L. J. Ch. 459, e all discussed. Cases which bear upon the question but are not scussed in *Finch* v. *G. W. Ry.* are *South Metropolitan Cemetery* . v. *Eden* (1855), 16 C. B. 42, at p. 57; 100 R. R. 608; *Watts Kelson* (1870), L. R. 6 Ch. 166; 40 L. J. Ch. 126; *Wood* v. *unders* (1875), L. R. 10 Ch. 582; 44 L. J. Ch. 514, and *G. W. y.* v. *Talbot*, [1902] 2 Ch. 759; 71 L. J. Ch. 835; *Sketchley* v. *erger* (1893), 69 L. T. 754; *Milner's Safe Co.* v. *Great Northern d City Railway*, [1907] 1 Ch. 208; 75 L. J. Ch. 807.

The aforementioned proposition must be considered as modified the case of ways over railways, to this extent, that the burden the easement must not be enlarged or altered : *Taff Vale Railway Gordon Canning*, [1909] 2 Ch. 48; 78 L. J. Ch. 492, applying W. Ry. v. *Talbot* (*supra*).

Access to other closes.

The grantee of a right of way cannot use it for access to a close her than that for which it is granted : *Lawton* v. *Ward* (1696), Ld. Raym. 75; *Henning* v. *Burnet* (*supra*); *Harris* v. *Flower* 904), 91 L. T. 816; 74 L. J. Ch. 127; but if the land is not tended to be held as a separate property, but to be thrown into d to form part of a larger close, the right of way is appurtenant the whole of such close : *Thorpe* v. *Brumfitt* (1873), L. R. 8 . 650.

Right of way over railway.

And under a grant of right of way over a railway the grantee is ly entitled to a right of way sufficient to make good the erruption which the construction of the railway causes by severce in the use and working of his own land, including any eration and extension of that working or use which could or ght to have been contemplated by the parties at the time of the

severance, and the owner is not entitled to use such right of way the passage of goods and traffic brought on to his land from ot places if such user substantially increases the burden of the ea ment as enjoyed at the date of the severance : *G. W. Ry.* v. *Tal* (*supra*).

Grant in gross.

A right of way can be granted in gross, and if so granted i personal licence : *Ackroyd* v. *Smith* (1850), 10 C. B. 164; 19 L. C. P. 315; 84 R. R. 507; but where the close forming the termi is granted by (and probably where it is mentioned in) the sa deed, the right is appurtenant to the land so granted mentioned); "the right of way is expressed to be over a pass running between the highway and the piece of ground which granted by the deed : it is therefore a grant of a right of way to s from that triangular piece of ground" : *per* James, L.J., *Thorpe* *Brumfitt* (1873), L. R. 8 Ch. 650, at p. 655.

Where fee subsequently purchased.

A grant to A, his heirs and assigns, that they, and the tena and occupiers of Blackacre, of which A was only tenant from y to year, might use a footway, does not cease on A's purchasing freehold of Blackacre, but the right is thenceforth appurten to the fee of Blackacre : *Rymer* v. *McIlroy*, [1897] 1 Ch. 528; L. J. Ch. 336.

Railways.

Under a grant of a free and convenient way for the purpose carrying coals, with liberty to make and lay causeways, the gran has a right to lay down a framed wagon-way : *Senhouse* v. *Christ* (1787), 1 T. R. 560; 1 R. R. 300; or a railway : *Dand* v. *Kingsc* (1840), 6 M. & W. 174; 9 L. J. Ex. 279; 55 R. R. 560; s however, *Neath Canal Co.* v. *Ynisarwed Colliery Co.* (1875), L. 10 Ch. 450; but under a grant of a right of way from A to B *alo* a road, the grantee is not justified in making a road *across* road : *Senhouse* v. *Christian*, *ubi sup.*

Footway.

A reservation of a right of way on foot, and for horses, ox cattle and sheep, does not give a right to lead manure : *Brunton* *Hall* (1841), 1 Q. B. 792; 10 L. J. Q. B. 258.

A reservation, in a lease of lands, of woods and mines, w power to cut down, work and carry away the same, "with f ingress, egress and regress, wayleave, and passage to and from same, or to and from any other mines . . . and also all necess and convenient ways, privileges, and powers whatsoever for purposes aforesaid," only gives a right of making ways over demised lands for the purpose of getting the excepted woods, mi and minerals : *Durham and Sunderland Ry. Co.* v. *Walker* (184 2 Q. B. 940; 57 R. R. 842.

Putting in pipes.

A covenant in a deed that the owners and occupiers of cert lands should and might pass and repass over "and have the f use and enjoyment" of certain roads, "in as full, free, compl

ıd absolute manner to all intents and purposes whatsoever as if ıe same were public roads," was held to entitle such owners) use the roads for laying gas-pipes therein : *Selby* v. *Crystal alace District Gas Co.* (1862), 30 Beav. 606.

Where road formed in part only.

A grant of a right of way over a road which was in part formed ıd in part only staked out, was held to extend over the whole road ıd not only over the formed part : *Wood* v. *Stourbridge Ry. Co.* 1864), 16 C. B. (N.S.) 222; 139 R. R. 472.

A right of way extends over the whole road, not only over the *ia trita* : *Nicol* v. *Beaumont* (1884), 53 L. J. Ch. 853.

Footway only.

A lease of a dry dock with a right of way for the lessee, his orkmen and servants, and all other persons or person by his uthority over a roadway and passage, which was a strip of land wenty-three feet wide, fourteen feet of which was subsequently aved, was held to be confined to foot passengers : *Cousens* v. *Rose* 1871), L. R. 12 Eq. 366.

Gateway.

A grant of certain land in the rear of a house approached by a ateway, passage, or tunnel, through and under that house, " together with the exclusive use of the gateway," the dimensions f which were given, entitles the grantee not merely to a right of ıay through the gateway, but to the use of the gateway for all ıwful purposes, and probably gives him ownership of the space ithin the gateway : *Reilly* v. *Booth* (1890), 44 Ch. D. 12. See lso *Phelps* v. *City of London Corporation*, [1916] 2 Ch. 255; 85 . J. Ch. 535.

Extends to licensees.

The grant, in a lease, of a right of way to " the lessee, his xecutors, administrators and assigns, under-tenants and servants," xtends to the licensees of the grantee lawfully going to and from he dominant tenement : therefore, where the lessee used the ominant tenement as a working-men's club, an injunction to estrain the members, honorary members, guests, visitors, officers nd tradespeople of the club from using the way was refused : *Baxendale* v. *North Lambeth Liberal and Radical Club, Ltd.*, 1902] 2 Ch. 427; 71 L. J. Ch. 806; *Hammond* v. *Prentice Bros., td.* [1920] 1 Ch. 201; 89 L. J. Ch. 91.

Repairs.

The grant to one and his heirs of the liberty to make a sough or rain in the grantor's land passed, as incident thereto, the liberty of aking sough pits at any time afterwards, while the object of the rant remained, being necessary for the purpose of repairing the ough : *Hodgson* v. *Field* (1806), 7 East, 613; 8 R. R. 701.

A grant by A to B and his heirs, who occupied certain houses butting on a strip of land about 11 feet wide dividing the said ouse from a house then belonging to A, of the right of using the ıtervening land as a foot or carriage way with " all other liberties, owers and authorities incident or appurtenant, needful or

necessary to the use, occupation and enjoyment of the said roa way or passage." *Held*, to give B a right to put down a flagsto upon the intervening strip in front of a door opened by him o of his house into this piece of land: *Gerrard* v. *Cooke* (1806), Bos. & Pul. (N.R.) 109.

Exceptions and reservations distinguished.

> "Note a diversity between an exception (whi is ever a part of the thing granted and of a thin *in esse*), for which *exceptis*, *salvo*, *praeter* and t like be apt words; and a reservation which is alwa of a thing not *in esse* but newly created or reserv out of the land or tenement demised": Co. Lit 47 a; Shep. Touch. p. 80.

An exception is to be taken as inserted for the benefit of t grantor and construed in favour of the grantee: *Savill Bros., L* v. *Bethell*, [1902] 2 Ch. 523, at p. 537 (71 L. J. Ch. 652). S judgment of Stirling, L.J., citing Shep. Touch. by Preston, p. 10 *Cardigan* v. *Armitage* (1823), 2 B. & C. 197; 3 D. & R. 414; R. R. 313; and *Bullen* v. *Denning* (1826), 5 B. & C. 842, 85 8 D. & R. 657; 29 R. R. 431. "If, then, the grant be clear, b the exception be so framed as to be bad for uncertainty, it appea to us that, on this principle, the grant is operative and t exception fails." *Ibid.*, at p. 538.

"A man upon his feoffment or conveyance cannot *reserve* himself parcel of the annual profits themselves, as to reserve t vesture or herbage of the land or the like, for that should repugnant to the grant": Co. Litt. 142 a; Brooke's Abridgmen tit. Reservation, pl. 46; *Fancy* v. *Scott* (1828), 2 Man. & Ry. 33

But in a Crown grant of land in New South Wales made in 18 a reservation to the Crown of the right to resume any quantit not exceeding ten acres, as may be required for public purpose does not constitute an exception which is repugnant to the gran *Cooper* v. *Stuart* (1889), 14 A. C. 286; 58 L. J. P. C. 93.

But with regard to reservations Lord Coke says: "Sometime hath the force of saving or excepting. So as sometime it serve to reserve a new thing, *viz.*, a rent, and sometime to except pa of the thing *in esse* that is granted": Co. Litt. 143 a; *Anon.* (1536 Dyer, 19 a, pl. 110; but see the criticism on the passage in Cok *per* Lord Denman, C.J., *Doe* v. *Lock* (1835), 2 Ad. & El. 705, p. 745; 4 L. J. K. B. 113; 41 R. R. 496.

What are exceptions,

Reservations

Timber trees, mines and quarries are exceptions: *Earl Cardigan* v. *Armitage* (1823), 2 B. & C. 197, at p. 207; 26 R. 313; *Doe* v. *Lock* (1835), 2 Ad. & El. 705, at pp. 743, 746; ren heriot, suit of court and suit of mills are reservations: *Doe*

ck (*supra*); hawking, hunting, fishing and fowling, and rights way are neither exceptions nor reservations, but privileges granted by the grantee : *Doe* v. *Lock* (1835), 2 Ad. & El. 705, p. 743; *Wickham* v. *Hawker* (1840), 7 M. & W. 63; 10 J. Ex. 153; 56 R. R. 623; *Durham and Sunderland Ry. Co.* *Walker* (1842), 2 Q. B. 940, at p. 967; 57 R. R. 842; and erefore if the deed be executed by the grantee such privileges can granted to persons other than the grantors : *Wickham* v. *Hawker* upra); but not if the deed be not executed by the grantee : *per* irling, J., *Thellusson* v. *Liddard*, [1900] 2 Ch. 635, at p. 645; L. J. Ch. 673. And for the new law, see p. 263.

and privileges.

Where in an indenture a lease was made by A to B of certain reditaments "except and always reserved out of this demise . . . l timber trees . . . and also except and reserved all royalties whatever to the said premises belonging, or in any wise appertaining," d there followed a covenant that A, his assigns and successors title might bring any actions in the name of B, his tenants, etc., ainst any persons trespassing on the demised lands for the rposes of hunting, coursing, shooting or sporting thereon; *semble*, e words "except and reserved all royalties" properly constituted exception and not a grant by the grantee of the estate : *Pannell* *Mill* (1846), 3 C. B. (o.s.) 625; 16 L. J. C. P. 91; 71 R. R. 449.

"I understand a reservation in its technical sense to be the grant out of the subject-matter conveyed of something not eviously existing, as a rent or an easement. The retention by the antor of something already existing in the subject-matter, as mines d the right to work them, is an exception" : *per* Scrutton, J., *nes* v. *Consolidated Anthracite Collieries, Ltd.*, [1916] 1 K. B. 3, at p. 135; 85 L. J. K. B. 465. See also *Lord Dynevor* v. *nnant* (1888), 13 A. C. 279, at pp. 289, 290; 57 L. J. Ch. 1078.

A conveyance by a vendor of a farm called "White Lodge" ntained a reservation to "the vendor, his heirs and assigns, the vners and occupiers for the time being of Coxhill" (another farm ld by the vendor in fee simple) "and their servants and others thorized by them," of "all rights of way hitherto exercised by em in respect of 'Coxhill' over any portion of 'White Lodge.'" e purchaser did not execute the conveyance. The vendor ought an action against the transferee of a mortgage of "White dge" claiming an injunction to restrain such transferee from terfering with the user of the right of way over "White Lodge." *eld*, that the vendor was entitled to the injunction and that effect ust be given to the reservation by the purchaser and his successors title taking with notice : *May* v. *Belleville*, [1905] 2 Ch. 605; 74 J. Ch. 678.

As to the operation of a reservation : *S. E. Ry.* v. *Associated*

Portland Cement Manufacturers, Ltd., [1910] 1 Ch. 12; 79 L. Ch. 150; and for the construction of a reservation, see *Foster Lyons*, [1927] 1 Ch. 219.

Mines and minerals.

A reservation of "minerals" defined: *Hext* v. *Gill* (187 L. R. 7 Ch. 699, at p. 712; 41 L. J. Ch. 761; and as affecting th rights under a building lease in respect of brickearth: *Johnstone Crompton & Co.*, [1899] 2 Ch. 190; 68 L. J. Ch. 559. As difference between "winning and "working," see note (u), p. 2 (2nd ed.), Encycl. Forms and Precedents (Butterworth), a generally Woodfall, Landlord and Tenant (21st ed.), pp. 2 227.

Mines include space which they occupy.

An exception of "mines" or "coal or limestone" is exception not only of the minerals but also of the space which th occupy: *Proud* v. *Bates* (1865), 34 L. J. Ch. 406; 146 R. R. 67 *Duke of Hamilton* v. *Graham* (1871), L. R. 2 H. L. Sc. 166; *Batte Pooll* v. *Kennedy*, [1907] 1 Ch. 256; 76 L. J. Ch. 162.

Exceptions must be clear.

An exception of mines must be clearly expressed. Thu "saving and reserving full and free liberty to search for, get, d drain, and carry away minerals found within the lands granted do not, without a context to the contrary, operate as an excepti of the minerals out of the grant: *Duke of Sutherland* v. *Heathco* [1891] 3 Ch. 504; [1892] 1 Ch. 475, at p. 483, where Lindley, L. says that "unless a clear intention to except the minerals can established" the decision of the House of Lords in the *Duke Hamilton* v. *Dunlop* (1885), 10 Ap. Ca. 813, on appeal fro Scotland, which appears to be directly contrary, "is of no assis ance"; *S. C.* 60 L. J. Ch. 841; 61 L. J. Ch. 248. See also *Mitch* v. *Mosley*, [1914] 1 Ch. 439, at p. 452; 83 L. J. Ch. 135.

Where A granted certain lands excepting all mines of coal wi liberty to enter and sink pits for getting all such coal except as lands within 150 yards of any messuage and except any homestea *Held*, that the second exception only applied to the liberty to si pits: *Bowler* v. *Wolley* (1812), 15 East, 444.

Must not infringe law against perpetuities.

An exception must not infringe the law against perpetuitie *Savill Bros., Ltd.* v. *Bethell* (*supra*, p. 268).

Exceptions include necessary powers;

Where there was a grant of lands excepting and reserving a mines of coal, together with sufficient wayleave and stayleave and from the said mines, together with liberty of sinking a digging a pit and pits for the winning of coal, it was held th under the reservation of the liberty of sinking pits, the right erecting steam engines and other machinery necessary for drawi the coals from the pits and draining the mines, with all prop accessories, passed as incident thereto: *Dand* v. *Kingscote* (1840 6 M. & W. 174, at p. 196; 9 L. J. Ex. 279; 55 R. R. 560.

Where one made a lease of lands excepting the trees, "it w

olved that when the lessor excepted the trees and afterwards l an intention to sell them the law gave him and them who uld buy power as incident to the exception to enter and show trees to those who would have them; for without sight none uld buy and without entry they could not see them" : *Liford's se* (1614), 11 Rep. 46 b, at p. 52 a.

But a lease of land with power to open and work mines does t imply, as a necessary incident thereto, power to fell timber to ke utensils for use in the mines, for the principle "is to be derstood of things incident and directly necessary" : *D'Arcy* v. *kwith* (1617), Hob. 234.

but not conveniences.

It appears that an exception cannot be made in favour of a rson who has not the legal estate, *e.g.*, on a grant by a mortgagor d mortgagee there can be no valid exception in favour of the mortgor : *Chetham* v. *Williamson* (1804), 4 East, 469, dissented from, t not on this point, in *Duke of Sutherland* v. *Heathcote* (*supra*), 270. But in consequence of the new property legislation this int is now of less importance, as the mortgagor will generally ve a legal estate.

No exception in favour of person not having legal estate.

Where a partition deed excepted and reserved to the tenants common the mines and minerals with power to enter and work e same for the joint benefit of the tenants in common "in as l and ample a manner to all intents and purposes as if these esents and the partition and division" of the said lands had t been done and made, it was held that the common law right the successors in title to the surface to support was by necessary plication displaced and that the successors in title to the mines uld work them so as to cause the surface and buildings thereon subside : *Davies* v. *Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 8; 86 L. J. Ch. 298, following *Beard* v. *Moira Colliery Co.*, [1915] Ch. 257; 84 L. J. Ch. 155.

Partition.

If a man either by grant or prescription have a right to wreck own upon another's land, of necessary consequence he has a ht to a way over the same land to take it : *Anon.* (1704), 6 d. 149.

Wreck.

The feoffor enfeoffed the feoffee of certain closes, except and erved to the feoffor his heirs and assigns all the coals in the ses, together with free liberty for the feoffor and his heirs and and their assigns and servants during the term that the feoffor l his heirs should be owners of the demesne lands of F to sink l dig pits, etc., it was held that the right incident to the eption and reservation of the coals to the feoffor his heirs and igns was not limited by the express liberty contained in the d, even if such express liberty was restricted to the time during ich the demesne lands of F continued in course of descent in

the feoffor and his heirs, which it was not : *Earl of Cardigan v. Armitage* (1823), 2 B. & C. 197; 26 R. R. 313.

Advowson.

As to the meaning of the expression "the advowson of the vicarage of D" where by a deed of consolidation the vicarage church of D had been incorporated with the rectory and parish church of a contiguous parish : *Elcho (Lord)* v. *Andrews*, [19 1 Ch. 706; 79 L. J. Ch. 586.

As to the difference between an exception and a reservation see Key & Elphinstone (12th ed.), Vol. I, Pt. I, p. 351.

New Law.

After 1925, "a conveyance of a legal estate expressed to be subject to another legal estate not in existence immediately before the date of the conveyance, shall operate as a reservation, unless a contrary intention appears" : section 65, sub-section 2 of the Law of Property Act, 1925.

CHAPTER XIV.

GENERAL WORDS—ALL THE ESTATE CLAUSE.

pendants and Appurtenants pass by Grant of Principal: Appendant and Appurtenant Distinguished: Extinguished Easements are not Appurtenant: "Appurtenances" only passes what is Appurtenant: But Context may enlarge Meaning: Recreation of Rights of Common: General Words only grant what Grantor has at time of Grant: Grant of Part of Tenement passes Continuous and Apparent Easements necessary for Grantee: Right of Way over Formed Road; and Way of Necessity: Way of Necessity always remains the same so long as it exists: No Reservation implied for Grantor except Way of Necessity: Way over Formed Road; and Reciprocal Easements: Grantor cannot derogate from Grant: Contemporaneous Sales: "All the Estate" Clause: Where Grantor is Trustee and has also a Beneficial Interest.

A CONVEYANCE of land always passed all that which was legally pendant or appurtenant thereto, but inasmuch as there often st many privileges, easements, or *quasi*-easements enjoyed with land which are not legally appendant or appurtenant thereto, vas usual, prior to the coming into operation of the Conveyancing , 1881, to insert in conveyances of land after the parcels divers eneral words" for the purpose of conveying all appurtenances, ements, and *quasi*-easements which were enjoyed with the land; it has long been unnecessary, and indeed is no longer usual, to ert such words, as by section 62 of the Law of Property Act, 5, a conveyance of land executed after December 31, 1881, is med to include and operates to convey with the land, unless a trary intention is expressed in the conveyance, the divers ticulars mentioned in that section, such particulars being an meration of the general words which it had been previously al to insert in conveyances. By sub-section 3 of the above ion the right to compensation for manorial incidents on the nguishment thereof shall be deemed to be a right appertaining the manor. Otherwise the section re-enacts section 6 of the veyancing Act, 1881.

General words no longer inserted in conveyances.

'The grant of the land includes the surface and all that is *supra*

—houses, trees, and the like—*cujus est solum ejus est usque* *caelum*—and all that is *infra, i.e.*, mines, earth, clay, etc." : Cozens-Hardy, M.R., in *Mitchell* v. *Mosley*, [1914] 1 Ch. 438, p. 450; 83 L. J. Ch. 135.

It was, even prior to the passing of the Conveyancing A 1881, unnecessary to insert any such general words for the purp of passing what was strictly appendant or appurtenant to the la for, as above stated—

Things appendant or appurtenant pass by conveyance of principal.

> That which is legally appendant or appurten passes by the conveyance of the principal, with the words "with the appurtenances," or the lik Co. Litt. 121 b; Shep. Touch. 89; *Whistler's C* (1612), 10 Rep. 63 a.

"The incident, accessory, appendant, and regardant, shal most cases pass by the grant of the principal, without the wo *cum pertinentiis*, but not *e converso*; for the principal doth pass by the grant of the incident, etc. *Accessorium non ducit, sequitur, suum principale* (Co. Litt. 152 a). And therefore by grant of a reversion without naming the rent, a reversion aften estate tail, for life, or [for] years, and the rent reserved upon estate, will pass, so as the tenant attorn to the grant [attornm is no longer necessary]; but by the grant of the rent the rever will not pass. So by the grant of a manor, the Court Ba thereunto belonging will pass; by the grant of a house, or grou the ways [and other conveniences, as garden, etc.] thereu belonging do pass; by the grant of arable land, the comm appendant thereunto will pass; by the grant of mills, the wat flood-gates, and the like that are of necessary use to the mills pass [also a stone belonging to the mill, though separated f the mill to be new worked]; by the grant of a house, the esto appendant thereunto will pass; by the grant of a manor, advowsons appendant, and villains regardant thereunto, pass [they may be severed by exception]; by the grant of a fair, Court of Piepowders will pass; by the grant of homage, or r the fealty will pass; and by the grant of escuage, homage fealty will pass": Shep. Touch. 89.

On a conveyance of an upland farm in North Wales there appertaining to such farm, and exercised and enjoyed therew and reputed and known as appurtenant thereto, a sheepwalk right of depasturing sheep on an adjoining mountain. *Held*, notwithstanding that this right was a *profit à prendre in alieno* it passed with the conveyance of the farm: *White* v. *Willi* [1922] 1 K. B. 727; 91 L. J. K. B. 721.

"Appendant is any inheritance belonging to another that is perior or more worthy. In law it is called *pertinens, quasi invicem nens*, holding one another; a word indifferent both to things pendant and things appurtenant. The quality and nature of the ings do make the difference. . . . Appendants are ever by pre-iption; but appurtenants may be created in some cases at this y. As if a man at this day grant to a man and his heirs common such a moor for his beasts levant or couchant upon his manor; if he grant to another common of estovers or turbary in fee nple, to be burnt or spent within his manor; by these grants ese commons are appurtenant to the manor, and shall pass by the ant thereof": Co. Litt. 121 b.

Appendant and appurtenant distinguished.

Thus common appendant cannot, but common appurtenant can, created by a modern grant. "It was laid down as far back as e twenty-sixth year of King Henry VIII, in a case which is ported as Case 15 in the Year Book for Trinity Term of that year, at common appendant cannot be created by a modern grant, and is proposition as far as I can discover has been accepted as law ever nce. . . . At the same time and in the same case it was also laid own that common appurtenant may be created by a modern grant, d the cases of *Sacheverell* v. *Porter* (1637), W. Jones, 396, and *owlam* v. *Slack* (1812), 15 East, 108; 13 R. R. 401, are more cent authorities to that effect": *per* Stirling, J., *Baring* v. *bingdon*, [1892] 2 Ch. 374, at p. 378; 62 L. J. Ch. 105, at p. 107.

Commons.

As to what can be "appendant" to another thing, see Co. Litt. 1 b, 122 a; *Tyrringham's Case* (1584), 4 Rep. 36 b; Viner or. *s.v.* "Appendant," A and B; *Hanbury* v. *Jenkins*, [1901] Ch. 401; 70 L. J. Ch. 730.

Appendants,

To make an easement appurtenant to a piece of land, it is cessary that the grant should be by deed, for a grant by parol ly does not make it strictly appurtenant. Thus, Blackburn, J., discussing the difference between the right to use a road granted deed and such a right granted merely by parol, says: "In the e case it would have become appurtenant, and in the other case it uld only have been enjoyed as if it were appurtenant": *Kay* v. *ley* (1875), L. R. 10 Q. B. 360, at p. 368; 44 L. J. Q. B. 210;

Appurtenants.

d any easement which, though at one time appurtenant to land, s become extinguished by unity of possession, is no longer strictly purtenant to the land, and can only be passed by words of express nt or by words which would be sufficient to create it if it had ver been appurtenant, *e.g.*, "used and enjoyed with the land."

Easements once extinguished are not appurtenant.

"We all agree that where there is unity of seisin of the land and the way over the land in one and the same person, the right of y is either extinguished or suspended according to the duration the respective estates in the land and the way, and that after such

extinguishment or during such suspension of the right, the w cannot pass as an *appurtenant* under the ordinary legal sense that word" : *per* Tindal, C.J., *James* v. *Plant* (1836), 4 A. & 749, at p. 761; 6 L. J. Ex. 260; 43 R. R. 465, at p. 470.

"With the appurtenances" only passes true appurtenanances.

A grant of land "with the appurtenances," other equivalent expression, will in general on pass what is strictly appurtenant.

Land not appurtenant to land.

It therefore will not in general pass other land, as "land m not be appurtenant to a messuage in the true and proper definiti of an appurtenance" : *Hill* v. *Grange* (1556), Plow. 164 a, at 170 *Anon.* (1564), Owen, 31, where a distinction is drawn betwee demise of the site of a manor with all the lands appurtenant to t said manor, and a similar demise with all the lands appertaining the said site—in the former case all the demesne lands pass, in t latter nothing but the site of the manor passes.

Examples.

Lands and buildings.

An adjoining building, not accounted parcel of a house, thou held with it for thirty years, *Held* not to pass : *Bryan* v. *Wethere* (1625), Cro. Car. 17. A kiln, *Held* not to pass : *Archer* v. *Benn* (1664), 1 Lev. 131; 1 Sidf. 211; 1 Keb. 736. Demise of a messua "with all rooms and chambers with the appurtenances belongi or in anywise appertaining thereto," *Held* not to include a roo which once formed part of the messuage, but had been separat from it and was not at the time of the demise occupied with i *Kerslake* v. *White* (1819), 2 Starkie, 508; 20 R. R. 731. adjoining stable, though used with a house for many years, *H* not to pass : *Maitland* v. *Mackinnon* (1862), 1 H. & C. 607; L. J. Ex. 49; 130 R. R. 682.

Allotments in lieu of commons.

Waste lands were inclosed under an Inclosure Act, and rights of common thereover were extinguished and lands allott to the owner of a farm in lieu of such rights; afterwards the own demised the farm "together with all commons, etc., and app tenances thereto belonging or usually held or enjoyed therewith it was held that no right over the allotments passed to the lessee reason of the general words in the lease : *Williams* v. *Phillips* (188 8 Q. B. D. 437; 51 L. J. Q. B. 102.

Commons.

Common not strictly appurtenant, *Held* not to pass : *Grymes* *Peacock* (1609), 1 Buls. 17; *Baring* v. *Abingdon*, [1892] 2 Ch. 37 62 L. J. Ch. 105. Common extinguished by unity of ownersh *Held* not to pass : *Saundeys* v. *Oliff* (1598), Moore, 467; and further cases relating to common, *infra*, p. 278.

Ways.

Way not bei a way of necessity, *Held* not to pass : *Brett* v. *Clowser* (188 5 C. P. D. 376. Way not strictly appurtenant, *Held* not to pas *Barlow* v. *Rhodes* (1833), 1 Cr. & M. 439; 2 L. J. Ex. 91;

. R. 653; *Worthington* v. *Gimson* (1860), 2 El. & El. 618; 29 . J. Q. B. 116; 119 R. R. 873; but as to a right of way over a rmed road, see *infra*, p. 285.

A right of fishing in gross, *Held* not to pass: see *Staffordshire* *nd Worcestershire Canal Navigation* v. *Bradley*, [1912] 1 Ch. 91; . L. J. Ch. 147; so of a right of warren in gross: see *Morris* v. *ines* (1834), 1 Ad. & El. 654; 3 L. J. K. B. 170; *Bowlston* v. *ardy*, Cro. Eliz. 547; see also *Hodgson* v. *McCreagh*, [1923] '. N. 269; 93 L. J. Ch. 339. Right of fishing.

Under a contract for the sale of land "with the appurtenances," e purchaser is only entitled to insert in his conveyance such eneral words as he would have been entitled to insert before the onveyancing Act, 1881, and the vendor is consequently entitled limit the words which by section 6 of that Act (now section 62 the Law of Property Act, 1925) would be deemed to be included the conveyance: *Re Contract between Peck and School Board r London*, [1893] 2 Ch. 315; 62 L. J. Ch. 598; *Re Hughes and shley's Contract*, [1900] 2 Ch. 595; 69 L. J. Ch. 741. Under such contract made before the Conveyancing Act, the purchaser was ot entitled to rights of way not strictly appurtenant: *Bolton* v. *olton* (1879), 11 Ch. D. 968; *Re Walmsley and Shaw's Contract*, 1917] 1 Ch. 93; 86 L. J. Ch. 120. Contract for sale with appurtenances.

A right to advertise by means of a man standing with an dvertisement board held to pass by the words "all rights, liberties, rivileges and appurtenances to the said premises belonging or in nywise appertaining or therewith used and enjoyed": *Henry* v. *cGlade*, [1926] N. I. 144.

The word "appurtenances" held to include a right of way ot appurtenant in the strict sense, but *de facto* enjoyed by the urchasers at the date of the conveyance: *Hansford* v. *Jago*, [1921] Ch. 322; 90 L. J. Ch. 129.

In commenting on *Bolton* v. *Bolton* (*supra*), Russell, J., says, 921] 1 Ch., at p. 330: "All the decision comes to is that that rticular contract was a contract for the sale of the land and its purtenances in the strict sense. It is not a decision that the ord 'appurtenances' may not include something not an appurnance in the strict sense." *Hansford* v. *Jago* (*supra*) relates to conveyance of land.

But the context may show that the word "appurtenances," or other equivalent expression, is used in a secondary sense of "usually held or enjoyed therewith." Context may enlarge meaning.

Thus, though "land may not be appurtenant to a messuage the true and proper definition of an appurtenance": *Hill* v.

Grange (1556), 1 Plow. 164 a, at 170 a; yet on a lease of a messuag "with all the lands to the said messuage appertaining" the wo "appertaining" was "taken in the sense of 'usually occupie with the messuage or 'lying to' the messuage, for when 'appertai ing' is placed with the said other words it cannot have its prop signification as it is said before, and therefore it shall have su signification as was intended between the parties, or else it sh be void": *Hill* v. *Grange* (1556), 1 Plow. 164 a at p. 170 Dy. 130 b; and a similar decision was come to in the case of grant from the Crown: *Gennings* v. *Lake* (1629), Cro. Car. 168.

Examples.

A conduit and the right to go upon another's land to mend i *Guy* v. *Brown* (1601), Moore, 644; *Brown* v. *Nichols* (1603), Moor 682; *Nicholas* v. *Chamberlain* (1606), Cro. Jac. 121; a garde *Doe* v. *Webster* (1840), 12 A. & E. 442; 9 L. J. Q. B. 37 54 R. R. 597; passed by a conveyance of a house "with t appurtenances": 2 Wms. Saund. 400, note (2) (ed. 1871, vol. p. 806, note (1)). See also *Schwann* v. *Cotton*, [1916] 2 Ch. 45 85 L. J. Ch. 689.

And in *Morris* v. *Edginton* (1810), 3 Taunt. 24; 12 R. R. 579, demise of land with all ways belonging and appertaining was he to pass a right of way used by the lessor over land of his ow And "appurtenances" in the habendum of a deed was extend to include a way not strictly appurtenant by the words "usual held and enjoyed therewith" in the premises: *James* v. *Pla* (1836), 4 A. & E. 749; 6 L. J. Ex. 260; 43 R. R. 465; reversi *S. C. sub nom. Plant* v. *James* (1833), 5 B. & Ad. 791; 2 Nev. M. 517.

Re-creation of rights of common extinguished by unity of possession.

A grant of a tenement to which has former been appurtenant a right of common, which h been extinguished by unity of possession, does n re-create such right of common if the words "com mons thereto appurtenant" are alone inserted the grant, but does re-create such right if the wor "commons therewith heretofore used and enjoyed are inserted in the grant.

In *Saundeys* v. *Oliff* (1598), Moore, 467; *Fort* v. *Ward* (1599 Moore, 667; *Marsham* v. *Hunter* (1609), Cro. Jac. 253; *S. C. s nom. Massam* v. *Hunter*, Yelv. 189; *sub nom. Massam* v. *Hu* 1 Brownl. & G. 220; *sub nom. Marsam* v. *Hunter*, 2 Brownl. & 209; *sub nom. Marsum* v. *Hunter*, 1 Bulstr. 2; *sub nom. Dars* v. *Hunter*, Noy, 136; *Clements* v. *Lambert* (1808), 1 Taunt. 20 9 R. R. 749; the word "appertaining" alone being used, no rig of common was created; but in *Bradshaw* v. *Eyre* (1598), Cro. El

0; *Worledg* v. *Kingswel* (1601), Cro. Eliz. 794; 2 And. 168; *ymes* v. *Peacock* (1609), Bulstr. 17; the words "heretofore used d enjoyed therewith" were used, and a right of common was eated.

Since 1882.

In grants since 1882 the general words deemed to be included in e grant by section 6, sub-section 1 of the Conveyancing Act, 1881 ow section 62, sub-section 1 of the Law of Property Act, 1925), nich do not include the word "heretofore," are not sufficient to -create the right unless it was actually enjoyed at the time of the ant: *Hall* v. *Byron* (1877), 4 Ch. D. 667; 46 L. J. Ch. 297, the neral words in the grant in which case are indistinguishable from ose in the Act.

Grant by copy.

A re-grant by copy, whether with or without any general words, a copyhold tenement which has, by forfeiture or otherwise, ecome vested in the lord, of course vests in the tenant the istomary rights of common: *Badger* v. *Ford* (1819), 3 B. & Ald. 53; 22 R. R. 331. But on the other hand the enfranchisement of copyhold extinguishes all rights of common in the lord's lands: *ort* v. *Ward* (1599), Moore, 667; *Marsham* v. *Hunter* (*supra*); *rowther* v. *Oldfield* (1704), Holt, 146; but in *Styant* v. *Staker* 1691), 2 Vern. 250, where the lord had enfranchised "with all ommons thereto belonging or appertaining," it was held that the ghts of common were not extinguished in equity. (But *quaere* hether the deed was not in fact rectified by inserting a grant of ommon: see the note at the end of the report.)

Enfranchisement.

Right of way.

As to extinguishment of right of way, see *Derry* v. *Saunders*, 1919] 1 K. B. 223 (C. A.); 88 L. J. K. B. 410.

The enfranchisement will extinguish a right of way enjoyed by n adjoining tenant of demesne land of the manor over the land nfranchised unless the right of way is expressly reserved by the eed of enfranchisement.

Customary freeholds.

The release of seignorial rights over customary freeholds does ot extinguish the rights of common: *Baring* v. *Abindon*, [1892] Ch. 374; 62 L. J. Ch. 105.

Grant of demesne.

A grant by the lord of part of his demesne, "together with l . . . commons . . . thereto belonging," does not pass to the antee any right of common, though the occupier of the land had lessee of the lord been accustomed to exercise rights of common ver the lord's wastes: *Baring* v. *Abingdon*, [1892] 2 Ch. 374; 62 . J. Ch. 105; but a grant with similar general words to the tenant the whole of the land occupied by him under a lease which cluded "reasonable common" was held to create a right of ommon, as the intention was necessarily to be inferred that the nant should take in perpetuity whatever he had enjoyed under the ase: *Doidge* v. *Carpenter* (1817), 6 M. & S. 47; 18 R. R. 299.

Grant of reversion on lease.

New Law.

Copyhold and customary tenures were abolished by Part V of th Law of Property Act, 1922.

General words, restricted to what grantor has at time of contract.

"General words in a grant must be restricte to that which the grantor had then" [*i.e.*, at th time of granting or contracting, *infra*, p. 296] "th power to grant, and will not extend to anythin that he may subsequently acquire": *per* Mellis L.J., *Booth* v. *Alcock* (1873), L. R. 8 Ch. 66 at p. 667; 42 L. J. Ch. 557.

This principle applies also to all rights which are implied upo the grant of a tenement: *Beddington* v. *Atlee* (1887), 35 Ch. I 317; 56 L. J. Ch. 655.

Thus, where a builder who had a contract for the grant to him leases of divers plots of land, which, however, was not to be tak as creating a demise, took a lease of one plot and transferred it the purchaser, it was held that such purchaser had no right access of light over an adjoining plot of land which was subs quently to such transfer demised to the builder: *Quicke* v. *Cha man*, [1903] 1 Ch. 659; 72 L. J. Ch. 373; distinguished, *Westwoo* v. *Heywood*, [1921] 2 Ch. 130; 90 L. J. Ch. 515.

And do not revive *quasi* easements long since disused.

Grant in 1872 by owner of two tenements, of one to P. "togeth with all ways to the said tenement now or *heretofore* held enjoyed." Prior to 1852 the occupier of such tenement had used formed private road, but in 1852 he built a wall which separate that tenement from the private road, and thenceforth did not u the private road. *Held*, that no right to use the private road passe by the grant: *Roe* v. *Siddons* (1888), 22 Q. B. D. 224.

Grant of part of a tenement passes continuous and apparent easements, which are necessary.

By the grant of part of a tenement, all tho continuous and apparent easements over the par retained by the grantor, which are necessary to th enjoyment of the part granted, and have before an up to the time of the grant been used therewith pass to the grantee: *Wheeldon* v. *Burrows* (1879 12 Ch. D. 31; 48 L. J. Ch. 853.

Easement.

The word "easement" is not here used in its strict sense, f when the two parts of the tenement are in the same ownership, a the acts which the owner does are referred to his ownership: s *per* Fry, J., *Bolton* v. *Bolton* (1879), 11 Ch. D. 968, at p. 97 48 L. J. Ch. 467; see *Re Walmsley and Shaw's Contract*, [191 1 Ch. 93, at p. 97; 86 L. J. Ch. 120. The word is here used

ean a right which would have been an easement if the several rts of the tenement had belonged to different owners.

Continuous easements.

"There is a distinction between easements such as a right of y, or easements used from time to time, and easements of neces- y, or continuous easements. The cases recognise this distinction, d it is clear law that, upon a severance of tenements, easements ed as of necessity, or [*sic*, *sed quaere*, "and easements which e"] in their nature continuous, will pass by implication of law thout any words of grant; but with regard to easements which are ed from time to time only [*sic*, *sed quaere*, "and are not of cessity"] they do not pass, unless the owner, by appropriate nguage, shows an intention that they should pass": *per* le, C.J., *Polden* v. *Bastard* (1865), L. R. 1 Q. B. 156, p. 161; 35 L. J. Q. B. 92; 147 R. R. 374; 7 B. & S. 130; proved by Mellish, L.J., in *Watts* v. *Kelson* (1871), L. R. 6 . 166, at p. 173. See also *Westwood* v. *Heywood*, [1921] 2 Ch. 0; 90 L. J. Ch. 515; *Schwann* v. *Cotton*, [1916] 2 Ch. 459; L. J. Ch. 689.

Apparent easements.

By "apparent" easements are meant "not only those which ust necessarily be seen, but those which may be seen or known on careful inspection by a person ordinarily conversant with the bject": *Pyer* v. *Carter* (1857), 1 H. & N. 916, at p. 922.

Necessary easements distinguished from

By "necessary" is meant necessary for the enjoyment of the nement in its existing state: *Pyer* v. *Carter* (1857), 1 H. & N. 916, p. 922; 26 L. J. Ex. 258; 108 R. R. 896. It has been defined Lord Campbell (*Ewart* v. *Cochrane* (1861), 7 Jur. (N.S.) 925; 3 R. R. 938; 4 Macq. Sc. App. 117, at p. 122) as "necessary for e convenient and comfortable enjoyment of the property as it isted before the time of the grant" (*i.e.*, before the severance).

easements of necessity.

The word "necessity" as used in the phrases "ways of neces- y" and "easements of necessity" has plainly a narrower mean- than the word "necessary" as used in the phrase "easements cessary to the reasonable enjoyment of the property conveyed." easement of necessity means "an easement without which the perty retained cannot be used at all, and not one merely neces- y to the reasonable enjoyment of that property": *per* Stirling, J., *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] Ch. 557, at p. 573; 71 L. J. Ch. 791; *Ray* v. *Hazeldine*, [1904] Ch. 17; 73 L. J. Ch. 537.

Drainage.

Where the drainage of a tan-yard ran into a cesspool in an oining garden, and the owner of both properties sold the tan- d. *Held*, that the right of drainage passed by the conveyance: *art* v. *Cochrane* (1861), 7 Jur. (N.S.) 925; 4 Macq. Sc. Ap. 117; R. R. 938.

Lights.

Where A built a house and let it to B, and afterwards let the

adjoining land to C, it was held that C could not block up t
windows of the house, for no person who claims the land under t
builder can obstruct the lights, any more than the builder hims
could, who cannot derogate from his own grant : *Palmer* v. *Fletch*
(1663), 1 Lev. 122; *S. C. sub nom. Palmer* v. *Fleshees*, 1 Sidf. 16
227; *sub nom. Palmer* v. *Flessier*, 1 Keb. 553, 625, 794; report
to the contrary, *sub nom. Palmer* v. *Fleshees*, Sir Thos. Raym. 8
See also, to the same effect, *Cox* v. *Matthews* (1672), 1 Vent. 2
239; *Compton* v. *Richards* (1814), 1 Price, 27; 15 R. R. 682.
the report of *Palmer* v. *Fletcher* in 1 Sidf. 167, it is said that if
lets two adjoining plots for building to B and C, and B builds
house, and afterwards C in digging his cellar makes B's hou
fall, B has no action against C. The distinction between the t
cases is that in the first case the *quasi*-easement had been us
before the severance, and therefore passed by the grant; in t
latter case the *quasi*-easement had not been so used and therefo
did not pass. It may be doubted, however, whether the *dictum*
correct. See "Support" *infra*, p. 283.

"If a man have a vacant piece of ground, and build thereupo
and that house has very good lights, and he lets this house
another, and after he builds upon a contiguous piece of ground,
lets the ground contiguous to another, who builds thereupon to t
nuisance of the lights of the first house, the lessee of the first hou
shall have an action upon the case against such builder, etc., :
the first house was granted to him with all the easements a
delights then belonging to it" : *per* Holt, C.J., *Rosewell* v. *Pr*
(1701), 6 Mod. 116; Holt, 500.

Where stables and land were conveyed, before 1882, by a gran
who retained the soil of a private road, on which the stab
abutted, on to which doors in the stables opened, and over wh
windows in the stables looked, and the grantor claimed the right
obscure the windows and obstruct the road, his counsel abandon
the claim to obscure the windows, and Chitty, J., said, "where
house is granted, lights as enjoyed by the house at the time of
grant pass without any express words, or indeed any words wh
ever, which implies a grant of the lights beyond the term 'house
and of course the same principle would apply in all its force t
grant of stables" : *Bayley* v. *Great Western Ry. Co.* (1884),
Ch. D. 434, at p. 438.

The lights, however, must be existing as lights, and not m
holes in a skeleton carcase, which might be adapted for use
either doors or windows : *Glave* v. *Harding* (1858), 27 L. J. E
286; 114 R. R. 1028.

Watercourse. The owner of a field in which there was a watering place
cattle supplied by a stream flowing through a place called

pyard, purchased the Hopyard, and then sold the field in which watering place was. *Held*, that he could not obstruct the w of water: *Sury* v. *Pigot* (1626), Pop. 166; Palm. 444; Tud. R. C. P. (4th ed.) 732; *S. C. sub nom. Surrey* v. *Piggot*, Noy 84; tch, 153; *sub nom. Shury* v. *Piggot*, 3 Bulstr. 339; *sub nom. ewry* v. *Pigott*, Sir. Wm. Jones, 145. See, to the same effect, *nham* v. *Fisk* (1831), 2 Cr. & Jer. 126; 1 L. J. Ex. 61; 37 R. R. 5; 2 Tyr. 155; *Wardle* v. *Brocklehurst* (1860), 8 W. R. 241; 1 El. El. 1065; 29 L. J. Q. B. 145; 117 R. R. 576.

Where the owner of a property laid down pipes from a tank to tle sheds, and afterwards sold the cattle sheds to the plaintiff, was held that the defendant, who was a subsequent purchaser the land with the tank, was not entitled to obstruct the pipes, d that the right to an unobstructed flow of water through the es passed to the plaintiff by implication without any words, and o by the general words, "waters, watercourses . . . with the me . . . used, enjoyed": *Watts* v. *Kelson* (1870), L. R. 6 Ch. 6; 40 L. J. Ch. 126. See also *Westwood* v. *Heywood*, [1921] Ch. 130; 90 L. J. Ch. 515; *Schwann* v. *Cotton*, [1916] 2 Ch. 459; L. J. Ch. 689.

Temporary watercourse.

But where the watercourse was an artificial millstream and pond which the owner of the mill and an adjoining farm had watered cattle, and afterwards the owner sold the farm, which abutted , but did not include any part of, the stream or pond, it was ld that no right, either by implied grant or under the general rds incorporated in the conveyance by section 6 of the Conveycing Act, 1881 (now section 62 of the Law of Property Act, 1925), have the flow of water maintained, passed to the purchaser of farm, for the stream and pond were formed for the temporary rposes of the mill only: *Burrows* v. *Lang*, [1901] 2 Ch. 502; tinguished *Schwann* v. *Cotton* (*supra*), at p. 120.

Underground water.

And a grantor may intercept water which is percolating through retained lands towards lands granted by him: *M'Nab* v. *bertson*, [1897] A. C. 129; 66 L. J. P. C. 27.

Support.

In a grant of land is implied a grant of the right to subjacent d adjacent support sufficient to support the land in its then state, in the state for the purpose of putting it into which the grant is de: *Caledonian Ry. Co.* v. *Sprot* (1856), 2 Macq. 449; cf. *Elliott North-Eastern Ry. Co.* (1863), 10 H. L. C. 333; *Aspden* v. *ldon* (1875), L. R. 10 Ch. 394; 46 L. J. Ex. 353; *Rigby* v. *nnett* (1882), 21 Ch. D. 559. But in the case of purchases made npulsorily under statutory powers, the right to support depends the statutory provisions, if any, in that behalf.

"If the conveyance is made for the express purpose of having ldings erected upon the land so granted, a contract is implied

on the part of the grantor to do nothing to prevent the land fr being used for the purpose for which, to the knowledge of t grantor, the conveyance is made" : *per* Page Wood, V.-C., *No Eastern Ry. Co.* v. *Elliott* (1860), 1 J. & H. 145, at p. 153; L. J. Ch. 808; 128 R. R. 313.

Accidental condition.

But this principle does not require the maintenance of accidental condition of things existing at the date of t conveyance, *e.g.*, the grantee of land is not entitled to prev the grantor from draining a drowned mine which adjoins subjoins the land granted, and thereby depriving the grantee the support of the water : *Ibid.*

Support from underground water.

Nor does it prevent a person claiming under the grantor fr draining the retained land, even though by so doing he depri the grantee of the support of the water which was contained the granted land : *Popplewell* v. *Hodkinson* (1869), L. R. 4 E 248; 38 L. J. Ex. 126; but this exception only applies to wat and not to silt : *Jordeson* v. *Sutton, Southcoates and Drypool C Co.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457; nor to pitch : *Trinid Asphalt Co.* v. *Amsard*, [1899] A. C. 594; 68 L. J. P. C. 114; neither of which cases, however, did the abstractor claim under t grantor.

Right of way not continuous and apparent easement,

A right of way is not a "continuous and apparent" easem within the above proposition.

It used to be the law that by the grant of a part of tenement no discontinuous easement over the part retained the grantor, other than a way of necessity, passed to the gran if the conveyance contained no general words, or only the wo "appurtenances" or its equivalent, but discontinuous easeme did pass if the conveyance contained the words "therewith us or enjoyed" or their equivalent, and this is still the law exce with regard to a right of way over a formed road, as to which *infra*, p. 285.

unless over formed road.

"It has been decided over and over again that where easement has become extinct by unity of ownership, and t owner wishes to grant the easement with the premises to whi it was formerly appurtenant, he must use language to show th he intended to create the easement *de novo*. If you convey t close, with all ways thereto belonging and appertaining, t easement will not pass, except in a case of a way of necessi where such a way would pass without any words of grant of wa . . . If in the case of an easement extinguished by unity of own ship, a man grants the land to which before the extinguishme the right of common was attached, and uses only the wo 'appertaining' and 'belonging,' the right will not pass, th words not being sufficient to revive the right. There are, howev

words for the purpose of passing such an easement; and if ı will only insert the words 'or therewith used and enjoyed,' right would pass. It has been said at the Bar that there is listinction between 'belonging' and 'appertaining'; it is the t time that I have heard of such a distinction": *per* Bayley, B., *rlow* v. *Rhodes* (1833), 1 Cr. & M. 439, at p. 448; 2 L. J. Ex. 91; R. R. 653. See, to the same effect, *Plant* v. *James* (1833), 3. & Ad. 791; 2 Nev. & M. 517; *S. C. sub nom. James* v. *Plant* error (1836), 6 Nev. & M. 282; 4 A. & E. 749; 6 L. J. Ex. 260; R. R. 465; *Worthington* v. *Gimson* (1860), 2 El. & El. 618; 29 J. Q. B. 116; 119 R. R. 873; and the remarks of Kelly, C.B., in *ngley* v. *Hammond* (1868), L. R. 3 Ex. 161; 37 L. J. Ex. 118; t these cases must be considered as now overruled, so far as they inconsistent with the proposition stated below as to rights of y over formed roads. For it is now law that— "Belonging."

> "If one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre and that has been used for the purpose of Blackacre in such a way that, if the two tenements belonged to several owners, there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser retaining Whiteacre, then the grant of Blackacre, either 'with all rights usually enjoyed with it' or 'with all rights appertaining to Blackacre,' or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre": *per* Fry, L.J., *Bayley* v. *Great Western Ry. Co.* (1884), 26 Ch. D. 434, at p. 457; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490; 57 L. J. Ch. 255; *Head* v. *Meara*, [1912] 1 Ir. R. Ch. 262.

Right of way over formed road passes as incident to land.

The way must be over a defined and formed road: *per* Bram- l, B., *Langley* v. *Hammond* (*supra*), at p. 171; per Mellish, L.J., *tts* v. *Kelson* (1871), L. R. 6 Ch. 166, at pp. 172, 174; *per* sh, J., *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360, at p. 370; Fry, J., *Barkshire* v. *Grubb* (1881), 18 Ch. D. 616, at p. 622; *Nicholls* v. *Nicholls* (1899), 81 L. T. 811, at p. 812, *per* ling, J. *Thomson* v. *Waterlow* (1868), L. R. 6 Eq. 36; 37 J. Ch. 495, is distinguishable on the ground that, as appears from er reports, there was not a formed road: see 37 L. J. Ch. 495, at 498; 18 L. T. 545, at p. 547; and 16 W. R. 686, at p. 687. Road must be formed.

And must be convenient for severed tenement.

If the convenience of use ceases upon the severance, the right way will not pass: *per* Romilly, M.R., *Thomson* v. *Waterl* (1868), L. R. 6 Eq. 36, at p. 41; and *per* Blackburn, J., *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360, at pp. 366, 367; distinguish *Langley* v. *Hammond* (1868), L. R. 3 Ex. 161; 37 L. J. Ex. 1 on this ground.

Chitty, J., seems to have doubted whether the mere grant Blackacre, without any general words at all, would pass the right way: see *Re Contract between Peck and School Board for Lond* [1893] 2 Ch. 315, at p. 322; 62 L. J. Ch. 598; followed in *Walmsley and Shaw's Contract*, [1917] 1 Ch. 93; 86 L. J. Ch. 1 On the other hand, it was held by the Court of Appeal in *Ford* *Metropolitan Ry. Co.* (1886), 17 Q. B. D. 12; 55 L. J. Q. B. 296 case which was not cited to Chitty, J.) that where a railway co pany had interfered with a right of access to certain rooms, wh was not a way of necessity, an arbitrator was entitled to g compensation for such interference, as the right of access was the nature of a continuous and apparent easement which pass under the demise of the rooms, though such demise contained express grant of any mode of access.

Immaterial whether easement existed before unity of possession.

It makes no difference whether the way or other right existed a legal easement in respect of the alleged dominant tenement bef the two tenements became united in possession or was first us during the unity of possession, and the decision of Romilly, M.R in *Thomson* v. *Waterlow* (*supra*), and the *dicta* of Kelly, C.B., *Langley* v. *Hammond* (*supra*), to the contrary are overrule *Watts* v. *Kelson* (1871), L. R. 6 Ch. 166; *Kay* v. *Oxley* (*supr* *Barkshire* v. *Grubb* (1881), 18 Ch. D. 616; 50 L. J. Ch. 731; th are also inconsistent with the earlier Scots case of *Ewart* v. *Cochra* (1861), 7 Jur. (N.S.) 925; 4 Macq. 117; 123 R. R. 938, which w not cited in *Thomson* v. *Waterlow* or *Langley* v. *Hammond*. "E it makes a great difference as matter of evidence on the questi whether the way" or other right "was used and enjoyed as app tenant": *per* Blackburn, J., *Kay* v. *Oxley* (1875), L. R. 10 Q. 363, at p. 367; for a way from close A over close B used before uni of possession would probably be a defined way, as no man would likely to allow his neighbour to pass over his land in any directi that he liked, and would probably be for the convenience of close after severance, as it must have been for its convenience bef unity of possession, and therefore proof of user before unity possession is strong evidence that the way is sufficiently defin and that it will be convenient after severance.

Enjoyment by verbal permission.

The general words incorporated in conveyances by the Conve ancing Act, 1881, s. 6 (now section 62, Law of Property Act, 192 pass to a purchaser rights of way actually enjoyed by him at t

e of the conveyance by verbal permission only of the vendor: *ernational Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165; 72 J. Ch. 543, which was the case of a leaseholder purchasing the ehold reversion, the vendor being owner of adjoining land also, l having allowed the lessee by verbal permission to go over such oining land.

Evidence of user.

The respective rights in regard to the use of water by riparian ners may be inferred from evidence of past user: *Baily & Co.* *Clark, Son and Morland*, [1902] 1 Ch. 649; (C. A.), 659; 71 J. Ch. 396; followed in *Whitmores (Edenbridge), Ltd.* v. *Stand*, [1909] 1 Ch. 427; 78 L. J. Ch. 144. See also *Lewis* v. *redith*, [1913] 1 Ch. 571; 82 L. J. Ch. 255.

Way of necessity.

"A right of way of necessity passes as incident to the grant" (*i.e.*, without any express words), "for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself": 1 Wms. Saund. 323, n. (ed. 1871 p. 570); Tud. L. C. Real P. (4th ed.), 754; see *Pinnington* v. *Galland* (1853), 9 Exch. 1; 22 L. J. Ex. 348; 96 R. R. 508.

The following are some of the early cases relating to ways of essity: *Jorden* v. *Atwood* (1605), Owen, 121; *Clarke* v. *Rugge* 07), 2 Roll. Abr. 60, pl. 17, 18; *S. C. sub nom. Clark* v. *Cogge*, . Jac. 170; *Packer* v. *Welsted* (1657), 2 Sidf. 39, 111; *Dutton* v. *ylor* (1699), 2 Lut. 1487; Nel. Lut. 477; *Staple* v. *Heydon* 03), 6 Mod. 1. For a more recent case, see *Brett* v. *Clowser* 80), 5 C. P. D. 376.

Grantor's land need not surround the close.

It has been decided that the grantor's land must entirely surnd the land granted, otherwise no way of necessity arises: *Titchrsh* v. *Royston Water Co.* (1900), 48 W. R. 201; but this decision not be supported, and there are authorities to the contrary, viz.: Roll. Abr. 60, pl. 18; *Pinnington* v. *Galland* (*supra*), ere the right of way arose upon the contemporaneous sale to erent purchasers of the alleged dominant and servient tenements, the dominant tenement was not surrounded on all sides by land the grantor; and the *dictum* of Blackburn, J., in *Pearson* v. *ncer* (1861), 1 B. & S. 571, at pp. 582 and 584; 124 R. R. 656, ere he said: "It was not disputed . . . that inasmuch as the tion of the farm bequeathed to Abraham was surrounded by the perty of third persons, so that there was no access to it at all ept by crossing the other property of the testator, which he ueathed to John Pearson, some way of necessity must be given r John Pearson's farm": p. 582. "When, as in the present

case, property devised or granted is land-locked, and there is other way of getting at it without being a trespasser, so that it ca not be enjoyed without a way of some sort over the lands of t testator or grantor, it is clear that a way of necessity is creat *de novo*" : p. 584. It may be observed that neither *Pinnington* *Galland* (1853), 9 Exch. 1; 22 L. J. Ex. 348; 96 R. R. 508, n *Pearson* v. *Spencer* was referred to in *Titchmarsh* v. *Royston Wa Co.* (1900), 48 W. R. 201.

Way of necessity only arises on grant or devise.

A way of necessity only arises on severance by grant (or devise : *Pearson* v. *Spencer* (1861), 1 B. & S. 571; (1863), 3 B. & 761); such a way does not arise if the severance be by escheat (*a* *Proctor* v. *Hodgson* (1855), 10 Exch. 824; 24 L. J. Ex. 195; 1 R. R. 852; or by the Statute of Limitations : *Wilkes* v. *Greenw* (1890), 34 Sol. Journ. 673; The Times, July 30, 1890, 3 d.

If grantor trustee.

And where the grantor was trustee of the land sold, and the was no access thereto but over land of which he was benefic owner, it was held that the grantee had a right of way over t grantor's own land : *Howton* v. *Frearson* (1798), 8 T. R. 5 4 R. R. 581.

Extent of way of necessity.

A way of necessity which passes to the grantee is limited to us thereof for the purposes for which the land granted was used the time of the grant (see *per* Jessel, M.R., *Corporation of Lond* v. *Riggs* (1880), 13 Ch. D. 798, at pp. 807, 808); but if the gra was for a special purpose it can at any rate be used also for t purposes for which the land was granted : *Serff* v. *Acton Lo Board* (1886), 31 Ch. D. 679; 55 L. J. Ch. 569.

Way of necessity is for ever.

It has been suggested that a right of way which arises necessity ceases when the necessity for using it ceases, and *Holm* v. *Goring* (1824), 2 Bing. 76; 9 Moo. 166; 2 L. J. (o.s.) C. P. 13 27 R. R. 549, has been cited as an authority for this proposition; b if the case is carefully examined it will be seen that it is not rea an authority for any proposition other than that there must b at the time of the grant, actual necessity for the way, and on th case Parke, B., has remarked : "The extent of the authority *Holmes* v. *Goring* is that, admitting a grant in general terms, may be construed to be a grant of a right of way as from time time may be necessary. I should have thought it meant as much grant for ever as if expressly inserted in a deed, and it struck me that time that the Court was wrong—but that is not the questi now." And Alderson, B., remarks : "Probably if this case taken to a Court of Error, *Holmes* v. *Goring* will be reviewed" *Proctor* v. *Hodgson* (1855), 10 Exch. 824, at pp. 827, 828; L. J. Ex. 195, at p. 197. See, however, *Buckby* v. *Coles*, *infra*.

(*a*) Escheat is abolished by section 45, sub-section 1 of the Administration Estates Act, 1925.

When on a grant of land there arises by implication either a nt or a reservation of a way of necessity, the grantor is entitled determine where the way is to be; see, as to grants, *Clarke* v. *gge* (1607), 2 Roll. Abr. 60, pl. 17; as to reservations, *Packer* v. *lsted* (1657), 2 Sidf. 39, 111. "In each case it appears to have n thought that the person by whose act the way was created ; subsequently to select the way, subject only to this, that it uld be a convenient way": *per* Blackburn, J., *Pearson* v. *ncer* (1861), 1 B. & S. 571, at p. 585; 124 R. R. 656; followed, he case of a way incident to a grant, in *Bolton* v. *Bolton* (1879), Ch. D. 968; 48 L. J. Ch. 467; see also *Re Walmsley and Shaw's ntract*, [1917] 1 Ch. 93; 86 L. J. Ch. 120.

Grantor selects the way.

It may be impossible, owing to lack of proper evidence, to say r what specific piece of land an implied easement of necessity sted: *Browne* v. *Maguire*, [1922] 1 Ir. R. 23.

A way of necessity once created must remain the same way so long as it exists.

Way of necessity is always the same.

"It seems to us settled by modern authority that the ground which the way of necessity is created is that a convenient way impliedly granted as a necessary incident. It is observed by rke, B., in *Proctor* v. *Hodgson* (1855), 10 Exch. 824, at p. 828; L. J. Ex. 195; 102 R. R. 852, that the extent of the authority *Holmes* v. *Goring* (1824), 2 Bing. 76; 9 J. B. Moo. 166, is that ugh it is a grant it may be construed to be a grant of such a nt of way as from time to time may be necessary. He adds, should have thought it meant as much a grant for ever as if ressly inserted in a deed, and it struck me at the time that the rt was wrong.' We certainly do not feel inclined to extend the hority of *Holmes* v. *Goring*, so far as to hold that the person whose possession the servient tenement comes may from time ime vary the direction of the way of necessity at his pleasure ong as he substitutes a convenient way. We think we must hold t the way of necessity once created must remain the same way long as it continues at all": *per* Blackburn, J., *Pearson* v. *ncer* (1861), 1 B. & S. 571, at p. 584; 124 R. R. 656.

It ssems to have been decided in *Buckby* v. *Coles* (1814), aunt. 311, at p. 316, that a prescriptive right of way was nguished by unity of seisin of the servient and dominant ments, but the Court came to this decision "without adverting he unity of occupation," and some doubt as to the correctness he decision on that point was expressed by the Court of eal in *Richardson* v. *Graham*, [1908] 1 K. B. 39; 77 J. K. B. 27.

Way of necessity revived.

Although not so decided in terms, it appears to be a safe

inference that *Buckby* v. *Coles* (*supra*) decided that a way necessity may revive when the necessity revives.

No implied reservation in favour of grantor of part of tenement, except way of necessity, or over formed road, and reciprocal easements of support and drainage.

In the absence of express stipulation, the grantor of part of a tenement retains no rights of any natur over the part granted: *Suffield* v. *Brown* (1864) 4 De G. J. & S. 185, at p. 194; 33 L. J. Ch. 249; 146 R. R. 267; *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31; 48 L. J. Ch. 853; *Union Lighterag Co.* v. *London Graving Dock*, [1901] 2 Ch. 300; [1902] 2 Ch. 557; 71 L. J. Ch. 791; *Ray* v. *Hazeldine*, [1904] 2 Ch. 17; 73 L. J. Ch. 537; except (i) a way of necessity, (ii) a right of wa over a formed road, where the retained part of th tenement is leased at the time of the grant, an perhaps even if it is not, and (iii) reciproc easements of support and drainage.

Rule applies to mortgages.

The rule applies where the part granted is on granted by way of mortgage: *Taws* v. *Knowle* [1891] 2 Q. B. 564; 60 L. J. Q. B. 641.

In *Pyer* v. *Carter* (1857), 1 H. & N. 916; 26 L. J. Ex. 25 108 R. R. 896, it was held that, on the sale of part of a tenemen there was implied in favour of the vendor a reservation of apparent and continuous easement, annexed in enjoyment to th part reserved, over the part sold; in fact, that there is distinction between an implied reservation and an implied gran Although this decision was approved by Mellish and James, L.J. in *Watts* v. *Kelson* (1870), L. R. 6 Ch. 166; 40 L. J. Ch. 126, principle was overruled in *White* v. *Bass* (1862), 7 H. & N. 72 31 L. J. Ex. 283; 126 R. R. 663; and the decision itself w strongly disapproved by Lord Westbury, C., in *Suffield* v. *Brow* (1864), 4 De G. J. & S. 185; by Lord Chelmsford, C., in *Crossley* *Sons* v. *Lightowler* (1867), L. R. 2 Ch. 478; 36 L. J. Ch. 584; a by the Court of Appeal in *Wheeldon* v. *Burrows* (1879), 12 Ch. 31; 48 L. J. Ch. 853, on the ground that no man should be allow to derogate from his own grant, and it must, it is submitted, considered as having been overruled, unless it can be upheld the grounds stated by Thesiger, L.J., in *Wheeldon* v. *Burro* (1879), 12 Ch. D. 31, at p. 59.

Exception of way of necessity.

Where a man having a close surrounded by his own lan grants the close to another in fee, for life, or years, the gran shall have a right of way to the close over the grantor's land incident to the grant; for without it he cannot derive any bene

n the grant. "So it is where he grants the lands and reserves close to himself": *Pomfret* v. *Ricroft*, 1 Wms. Saund. 323 . 1871, p. 568), note 6, citing *Clarke* v. *Rugge*, 2 Roll. Abr. 60, 17, 18; *S. C. sub nom. Clarke* v. *Cogge* (1607), Cro. Jac. 170; *den* v. *Atwood* (1605), Owen, 121; *Staple* v. *Heydon* (1703), Mod. 1; *Howton* v. *Frearson* (1798), 8 T. R. 50; 4 R. R. 581. s note is cited with approval by Martin, B., in the judgment he Court in *Pinnington* v. *Galland* (1853), 9 Exch. 1, where he s (at p. 12): "It no doubt seems extraordinary that a man uld have a right which certainly derogates from his own grant; the law is distinctly laid down to be so, and probably for the son given in *Dutton* v. *Taylor* (1699), 2 Lutw. 1487, that it was the public good, as otherwise the close surrounded would not capable of cultivation." See also *Wheeldon* v. *Burrows* (*supra*), p. 49.

Building schemes.

Although nothing but a way of necessity is impliedly reserved to vendor, yet special words in the grant or special circumstances own to the grantee at the time of the grant may show that rights, er than rights strictly of necessity, are reserved to the grantor. us, it has been held that on the sale of land to a purchaser, who notice that adjoining land belonging to the vendor was to be laid for building in a manner which would make a way over the pur-

Way.

sed land necessary to the vendor, such right of way was reserved he vendor by implication: *Davies* v. *Sear* (1869), L. R. 7 Eq. ; 38 L. J. Ch. 545; and in a case in which the lessee of several s of land, in the lease of each of which was a covenant to d in accordance with certain plans, built thereon, in ordance with those plans, a large warehouse, which was able of being subdivided into several blocks each capable of being d as a separate building, it was held that the mortgagee of one he blocks who had foreclosed, but whose mortgage contained a

Lights.

tal of the building scheme and a covenant to complete in accord- e therewith, could not interfere with the access of light to the er blocks: *Russell* v. *Watts* (1885), 10 App. Cas. 590 (55 L. J. 158) in which case Selborne, L.C., said (at p. 602): "If on le and conveyance of land adjoining a house to be built by vendor, it is mutually agreed that one of the outer walls of house may stand (whether wholly or partly I think is imma- al), within the verge of the land sold, and shall have in it icular windows opening upon and overlooking the land sold, if the house is erected accordingly, can the purchaser after- ds build upon the land sold so as to prevent or obstruct the ss of light to those windows? I should have been prepared to de that he could not, even if there had been no such authorities *Palmer* v. *Fletcher* (1663), 1 Lev. 122; *Swansborough* v.

Coventry (1832), 9 Bing. 305; 2 L. J. C. P. 11; 35 R. R. 66
Compton v. *Richards* (1814), 1 Price, 27; 15 R. R. 682; *Allen*
Taylor (1880), 16 Ch. D. 355." See also *Hansford* v. *Jago*, [192
1 Ch. 322; 90 L. J. Ch. 129; *Broomfield* v. *Williams*, [1897] 1 C
602; 66 L. J. Ch. 305.

Extent of way of necessity reserved.

In *Corporation of London* v. *Riggs* (1880), 13 Ch. D. 79
the question arose what was the extent of a way of necessi
impliedly reserved to the grantor. It was held by Jessel, M.R
citing *Gayford* v. *Moffatt* (1868), L. R. 4 Ch. 133, that the rig
of way must be limited to that which is necessary at the tim
of the grant; that is, the owner must be supposed to take
re-grant to himself of such a right of way as would enable h
to use the reserved close as it was at the time of the gran
"That appears to me to be the meaning of a right of way
necessity. If you imply more, you reserve to him not only th
which enables him to enjoy the thing he has reserved as it is, b
that which enables him to enjoy it in the same way and to t
same extent as if he reserved a general right of way for all purpose
that is—as in the case I have before me—a man who reserv
two acres of arable land in the middle of a large piece of la
is to be entitled to cover the reserved land with houses, and c
on his grantee to allow him to make a wide metalled road
to it. I do not think that is a fair meaning of a way of necessit
I think it must be limited by the necessity at the time of the gran
and that the man who does not take the pains to secure an actu
grant of a right of way for all purposes is not entitled to be put in
better position than to be able to enjoy that which he had at t
time the grant was made. I am not aware of any other princip
on which this case can be decided. I may be met by the objecti
that a way of necessity must mean something more than what
have stated, because, where the grant is of the enclosed piece, t
grantee is entitled to use the land for all purposes, and should the
fore be entitled to a right of way commensurate with his rig
of enjoyment. But there again the grantee has not taken from t
grantor any express grant of a right of way; and all he can
entitled to ask is a right to enable him to enjoy the property grant
to him as it was granted to him. It does not appear to me that t
grant of the property gives any greater right. But even if it di
the principle applicable to the grantee is not quite the same as t
principle applicable to the grantor; and it might be that the gran
obtains a larger way of necessity—though I do not think he does
than the grantor does under the implied re-grant": *ibid.*, at p. 8

Exception of way over formed road.

A way of necessity means a way without which there is no acc
to the land in question; and so where an owner of two teneme
granted one, including a passage, which had been used as a me

access to the other, it was held that he had no right of access over ch passage to the retained tenement, it not being a way of cessity, though the convenient and usual mode of access : *Dodd* v. *rchell* (1862), 1 H. & C. 113; 8 Jur. 1180; 31 L. J. Ex. 364; 130 R. 410; but in *Thomas* v. *Owen* (1887), 20 Q. B. D. 225; 57 J. Q. B. 198, it was held, in a similar state of circumstances, cept that the retained tenement was at the time of the grant in ıse, that a subsequent lessee of the retained tenement had a right way over the passage, which was a formed road, under a lease the retained tenement and its appurtenances. See also *Hansford* *Jago* (*supra*); *Westwood* v. *Heywood*, [1921] 2 Ch. 130; 90 J. Ch. 575 : "It is urged that alike in implied reservations and implied grants, a rule exists to this effect, that whilst such an ıplication" (*i.e.*, of the grant or reservation of an easement) may arise in the case of easements of necessity and continuous sements, it cannot arise in the case of easements which are neither necessity nor continuous, and for this proposition *Polden* v. *ıstard* (1865), L. R. 1 Q. B. 156; 35 L. J. Q. B. 92; 147 R. R. 4, is cited, and many other authorities might have been invoked. ıt on this principle as established by such decisions there has en engrafted by other decisions an exception in the case of a rmed road made over an alleged servient tenement to and for the parent use of the dominant tenement (*per* Bramwell, B., in *ıngley* v. *Hammond* (1868), L. R. 3 Ex. 161; 37 L. J. Ex. 118; *atts* v. *Kelson* (1870), L. R. 6 Ch. 166; 40 L. J. Ch. 126), and if e exception arises in the case of a grant we think it ought to ise in the case of a reservation made to support an earlier grant, in the present case" : *per* Fry, L.J., *Thomas* v. *Owen* (1887), Q. B. D. 225, at p. 231; 57 L. J. Q. B. 198. See also *Gordon* v. *ilvie* (1899), 15 T. L. R. 239.

Exception of reciprocal easements of support;

"We are all of opinion that, where houses have been erected in mmon by the same owner upon a plot of ground, and before cessarily requiring mutual support, there is, either by a presumed ant or by a presumed reservation, a right to such mutual support; that the owner who sells one of the houses, as against himself ants such right, and on his own part also reserves the right, and ısequently the same mutual dependence of one house upon its ghbours still remains" : *per* Pollock, C.B., *Richards* v. *Rose* 853), 9 Exch. 218, at p. 221; *Russell* v. *Watts* (1883), 25 Ch. D. 9, at p. 573; 55 L. J. Ch. 158; and see *James* v. *Pritchard*, [1908] Ch. 630, at p. 636; 77 L. J. Ch. 405.

and drainage.

"I have already pointed to the special circumstances in *Pyer* *Carter* (1857), 1 H. & N. 916; 26 L. J. Ex. 258; 108 R. R. 896, d I cannot see that there is anything unreasonable in supposing ıt in such a case, where the defendant under his grant is to take

this easement, which had been enjoyed during the unity of ownershi of pouring his water upon the grantor's land, he should also be he to take it subject to the reciprocal and mutual easement by whi that very same water was carried into the drain on that land, a then back through the land of the person from whose land the wat came. It seems to me to be consistent with reason and comm sense that these reciprocal easements should be implied; a although it is not necessary to decide the point, it seems to worthy of consideration in any after case, if the question wheth *Pyer* v. *Carter* is right or wrong comes for discussion, to consid that point" : *per* Thesiger, L.J., *Wheeldon* v. *Burrows* (187 12 Ch. D. 31, at p. 59. See also *Cory* v. *Davies*, [1923] 2 Ch. 9 92 L. J. Ch. 261, where appropriate grants and reservations relati to the user of a carriage drive were implied in leases of certa building plots (notwithstanding the existence of some expr reservations in the leases) in order to give effect to a comm intention manifested on the part of the lessees and their lessor.

Grantor cannot derogate from grant.

In the absence of express stipulation the grant of part of a tenement cannot use the part retain so as to derogate in any way from the grant.

Palmer v. *Fletcher* (1663), 1 Lev. 122; *S. C. sub nom. Palmer* *Fleshees*, 1 Sidf. 167, 227; *sub nom. Palmer* v. *Flessier*, 1 Keb. 55 625, 794; reported to the contrary *sub nom. Palmer* v. *Fleshe* Sir Thomas Raym. 87; *North Eastern Ry. Co.* v. *Elliot* (186 J. & H. 145; 29 L. J. Ch. 808; 128 R. R. 313; *S. C. sub nom. Ell* v. *North Eastern Ry. Co.* (1863), 10 H. L. C. 333; *Allen* v. *Tay* (1880), 16 Ch. D. 355. See also *Hansford* v. *Jago*, [1921] 1 C 322; 90 L. J. Ch. 129.

"If a landowner conveys one of two closes to another cannot afterwards do anything to derogate from his grant; and the conveyance is made for the express purpose of having buildi erected upon the land so granted, a contract is implied on the pa of the grantor to do nothing to prevent the land from being us for the purpose for which to the knowledge of the grantor t conveyance is made" : *per* Wood, V.-C., *North Eastern Ry. C* v. *Elliot* (1860), 1 J. & H. 145, at p. 153; cf. *Pollard* v. *Ga* [1901] 1 Ch. 834; 70 L. J. Ch. 404.

Rule applies to all grantor's land.

The rule applies to the grantor as owner of all the rest of t tenement whether actually adjoining the part granted or separat from it by a street or passage : *Birmingham, Dudley and Distr Banking Co.* v. *Ross* (1888), 38 Ch. D. 295.

Railway company.

The rule applies where the grantor is a railway company, exce so far as the grantor may require to use the part retained for t construction of their railway : *Myers* v. *Catterson* (1889), 43 Ch.

0; and the rule applies where the grantor is a mortgagee selling ıder his power of sale: *Born* v. *Turner*, [1900] 2 Ch. 211; 69 J. Ch. 593.

Building schemes,

The rule, however, does not entitle the grantee to claim an sement of light to an extent inconsistent with the intention to implied from the circumstances existing at the time of the ant and known to the grantee: *Birmingham, Dudley and District anking Co.* v. *Ross* (1888), 38 Ch. D. 295; 57 L. J. Ch. 106, 601; llowed in *Godwin* v. *Schweppes, Ltd.*, [1902] 1 Ch. 926; 71 J. Ch. 438, where there was a building agreement under which e grantee of the alleged dominant tenement was to build on the leged servient tenement, and where the grantee, with the concurnce of the grantor but in deviation from the building agreement, ıd built part of the wall of the dominant tenement as a party-wall ıd had laid in the servient tenement foundations for buildings milar to those built on the dominant tenement, and where there as in the conveyance of the dominant tenement a plan plainly ıowing only a small open area on the servient tenement.

But the subsequent use of the land retained must be consistent ith and in pursuance of the user contemplated at the time of the ant: *Wilson* v. *Queen's Club*, [1891] 3 Ch. 522; 60 L. J. Ch. 698.

Extraordinary light.

This rule does not give the grantee the right to light for xtraordinary purposes, but only to light sufficient for all ordinary urposes of business in the locality: *Corbett* v. *Jonas*, [1892] 3 Ch. 37; 62 L. J. Ch. 43. Nor does it give him the right to access of r except where such right is enjoyed through a definite aperture the nature of a window on the property granted, or through a efinite channel on the property retained, but if the grant is for particular purpose, as for carrying on the business of a timber erchant, the grantor cannot build on the part retained so as to terrupt access of air to sheds built by the grantee for drying mber so as to interfere with the conduct of the business in the dinary course: *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] Ch. 437; 63 L. J. Ch. 601; see also *Cable* v. *Bryant*, [1908] Ch. 259; 77 L. J. Ch. 78.

Air,

Grant for particular trade.

Where premises are demised for the purpose of carrying on a rticular trade, the lessor is not bound to abstain from doing a wful act on his retained premises which is detrimental to one licate branch of the lessee's trade, though not to the lessee's trade nerally, at least if the lessor, when granting the lease, did not ıow, and it was not common knowledge, that such act would be jurious to that branch of the lessee's trade: *Robinson* v. *Kilvert* 889), 41 Ch. D. 88; 58 L. J. Ch. 392.

And where lessors dealt with premises adjoining their lessees' emises in a manner which was neither unreasonable nor unbusiness-

like, which did not physically affect the demised premises and whi had rendered it substantially more expensive, but not less easy legal for the lessees to conduct thereon the business for which t premises had been demised, it was held that the lessors' interferen did not amount to a derogation of their grant : *O'Cedar, Ltd. Slough Trading Co.*, [1927] 2 K. B. 123; 96 L. J. K. B. 709.

Building land.

The mere designation of the retained land in the deed and the plan annexed thereto as "building land" does not show intention so to restrict the right of light implied in the conveyan of a house as to enable the vendor to interfere with the access light, nor does it show an intention that the general words co tained in section 6 of the Conveyancing Act, 1881 (now section of the Law of Property Act, 1925), should not be incorporated in the conveyance : *Broomfield* v. *Williams*, [1897] 1 Ch. 602; L. J. Ch. 305; followed in *Pollard* v. *Gare*, [1901] 1 Ch. 83 70 L. J. Ch. 404, where there was an agreement under which a hou was to be built by the intended lessee and a lease granted there when built. The grantee, moreover, only gets such rights as t grantor could himself grant; so that if at the time of the grant t grantor has contracted to sell the part retained the grantee is n entitled, as against the purchaser of such retained part, to t benefit of the rule : *Beddington* v. *Atlee* (1887), 35 Ch. D. 317; L. J. Ch. 655.

Rule only applies to what grantor might have granted.

So where Broadhaven House was supplied by a line of pip with water from a well on Swanswell, which adjoined Broadhav House, and the owner of both made an equitable mortgage Swanswell by deposit of deeds, with an agreement to execute legal mortgage, and afterwards conveyed Broadhaven House wi the appurtenances to the plaintiff, and then executed a leg mortgage of Swanswell to the mortgagee, who conveyed to t defendant, it was held that the purchaser of Broadhaven had implied grant of the supply of water from Swanswell : *Davies Thomas*, [1899] W. N. 244.

Rights determined at date of contract.

The rights to be enjoyed with a house to be built are to determined, not at the time of the conveyance, but of the contra for the purchase, of the site : *per* Rigby, L.J., *Broomfield Williams*, [1897] 1 Ch. 602, at p. 616; *Pollard* v. *Gare*, [1901] Ch. 834; 70 L. J. Ch. 404; and *Godwin* v. *Schweppes, Ltd.*, [190 1 Ch. 926.

Words not supplied so as to cause derogation from grant.

The Court will not read words into a document where to do would have the effect of a derogation from the grant : *Anglo-Ne foundland Development Co.* v. *Newfoundland Pine and Pulp C* (1914), 83 L. J. P. C. 50.

The doctrine of derogation from grant is considered a explained in *Harmer* v. *Jumbil*, [1921] 1 Ch. 200; 90 L. J. Ch. 14

Contemporaneous sales.

Where two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous and apparent *quasi*-easement in respect of either property is the same as if it had been conveyed first: *Compton* v. *Richards* (1814), 1 Pri. 27; 15 R. R. 682; *Swansborough* v. *Coventry* (1832), 9 Bing. 305; 2 L. J. C. P. 11; 35 R. R. 660; *Allen* v. *Taylor* (1880), 16 Ch. D. 355; 50 L. J. Ch. 178; *Rigby* v. *Bennett* (1882), 21 Ch. D. 559, at p. 567; *Russell* v. *Watts* (1883), 25 Ch. D. 559, at pp. 573, 584, and (1885), 10 Ap. Ca. 590, at p. 612; 55 L. J. Ch. 158.

It will be observed that this proposition is, strictly speaking, not rule of interpretation for the construction of the deeds, but an plication of the rule of equity, that the purchaser of property kes it subject to all equitable interests of which he has notice. he new Property Acts have sensibly modified the number of cases which a purchaser will be affected by notice.

Sales must be contemporaneous.

This proposition does not extend to the case where two properties e put up for sale at the same auction, and one only is sold, and e other is shortly afterwards sold: *Wheeldon* v. *Burrows* (1879), 2 Ch. D. 31; 48 L. J. Ch. 853.

Rule applies to devises.

This principle applies where two tenements are devised by the me will, and it is immaterial that one passes by specific devise d the other by residuary devise: *Barnes* v. *Loach* (1879), 4 . B. D. 494; 48 L. J. Q. B. 756; *Phillips* v. *Low*, [1892] 1 Ch. 47; *chwann* v. *Cotton*, [1916] 2 Ch. 459; 85 L. J. Ch. 689.

As to the right of one of two purchasers who buy at the same me land formerly held by a common owner to go on to the other's nd to clear a millstream and repair its banks, see *Long* v. *owlett*, [1923] 2 Ch. 177; 92 L. J. Ch. 530.

"All the estate" clause.

In conveyances executed prior to 1882 it was usual to add to the rcels a conveyance of all the estate, right, and title of the conveyg party in the property conveyed; and by section 63 of the Law Property Act, 1925, every conveyance executed after 1881 is by rtue of that Act effectual to pass, if and so far as a contrary tention is not expressed in the conveyance, "all the estate, right, le, interest, claim and demand which the conveying parties spectively have in, to, or on the property conveyed or expressed, intended so to be, or which they respectively have power to nvey in, to, or on the same." Since 1881 it has been usual to it the express conveyance of the conveying parties' estate.

Conveyance of all a man's estate and interest for value.

A conveyance (whether express or implied the terms of the Law of Property Act, 1925) of the estate, right, title, or interest of the grantor property to a purchaser for value, passes eve interest of the grantor, although not vested in hi in the character in which he is made a party to t conveyance.

"Estate."

"'State' or 'estate' signifieth such inheritance, freehold, te for years, tenancy by statute merchant, staple, *elegit*, or the like, any man hath in lands or tenements, etc. And by the grant of estate, etc., as much as he can grant shall pass. . . . Tenant for li the remainder in tail, the remainder to the right heirs of tenant life, tenant for life grants *totum statum suum* to a man and heirs, both estates do pass. 'Right,' *jus sive rectum* (which Litt ton often useth) signifieth properly, and specially in writs a pleadings, when an estate is turned to a right, as by discontinuan disseisin, etc., where it shall be said *quod jus discendit et non ter* But 'right' doth also include the estate *in esse* in conveyance and therefore if tenant in fee simple make a lease for years, a release all his right in the land to the lessee and his heirs, t whole estate in fee simple passeth. And so commonly in fines, t right of the land included and passeth the state of the land; *A cognovit tenementa praedicta esse jus ipsius, B*, etc. And t statute (West. 2, c. 3) saith *jus suum defendere*, which is *stat suum*. And note that there is *jus recuperandi, jus intrandi, habendi, jus retinendi, jus percipiendi, jus possidendi*. 'Title,' pr perly (as some say) is when a man hath a lawful cause of ent into lands whereof another is seised, for the which he can have action, as title of condition, title of mortmain, etc. But legally t word 'title,' includeth a right also as you shall perceive in ma places in Littleton; and title is the more general word; for eve right is a title, but every title is not such a right for which an acti lieth; and therefore *titulus est justa causa possidendi quod nostr est*, and signifieth the means whereby a man cometh to land, as title is by fine or by feoffment, etc. And when the plaintiff assize maketh himself a title, the tenant may say *veniat assisa su titulum;* which is as much as to say, upon the title which t plaintiff hath made by that particular conveyance. *Et dicit titulus a tuendo*, because by it he holdeth and defendeth his lan and as by a release of a right a title is released, so by release of title a right is released also. . . . 'Interest,' *Interesse* is vulgar taken for a term or chattel real, and more particularly for a futu term; in which case it is said in pleading, that he is possessed

"Right."

"Title."

"Interest."

eresse termini (b). But *ex vi termini*, in legal understanding, it endeth to estates, rights, and titles, that a man hath of, in, to, out of lands; for he is truly said to have an interest in them; l by the grant of *totum interesse suum* in such lands, as well ersions as possessions in fee simple shall pass. And all these rds singularly spoken are *nomina collectiva*; for by the grant *totum statum suum* in lands all his estates therein pass. *Et sic caeteris*" : Co. Litt. 345 a. See also *Altham's Case* (1610), Rep. 150 b.

"If a man be seised of land in fee simple, or for life, or have estate in it for years, by statute merchant, staple, *elegit*, or like; and he grant all his estate, or all his right, or all his title, all his interest of and in the land; by this grant all his estate, d as much as he is able to grant, doth pass" : Shep. Touch. 98.

"This is clear, that when a person having several estates and erests in a denomination of land, joins in conveying all his estate d interest in the lands to a purchaser, every estate or interest sted in him will pass by that conveyance, although not vested him in the character in which he became a party to the nveyance. It is true that in *Fausset* v. *Carpenter* ((1831), Dow. & Cl. 232; 5 Bri. N. R. 75; 35 R. R. 17) the House of rds took a different view. At the time when that case was cided, it was thought impossible to maintain the decision, and was a subject of consideration among the profession whether it uld not be advisable to bring in a short Act of Parliament to verse it. That case cannot operate to weaken the rule of law. thing could be more mischievous or contrary to law than to ld that when a party professes to convey all his estate and terest in particular lands, the operation of his conveyance should limited to the estate which was vested in him in the character which he purported to join in the conveyance" : *per* Lord St. onards, C., *Drew* v. *Earl of Norbury* (1846), 3 J. & L. 267, at 284; 9 Ir. Eq. Rep. 171, at p. 177; 72 R. R. 62.

"*Prima facie*, when a person conveys or settles an estate, he eans to include in the conveyance every interest which he can rt with and which he does not except. General words apt for at purpose are invariably used" : *per* Lord Cranworth, C., hnson v. *Webster* (1854), 4 De G. M. & G. 474, at p. 488; 24 J. Ch. 300; 102 R. R. 225.

The principle above laid down by Lord St. Leonards was

(b) For the definition of *interesse termini* see *Gillard* v. *Cheshire Lines Committee* (1884), 32 W. R. 943, adopted in *Mann, Crossman & Paulin, Ltd.* v. *The gistrar of the Land Registry*, [1918] 1 Ch. 203; 87 L. J. Ch. 81. The doctrine *interesse termini* is abolished by section 149, sub-section 1 of the Law of perty Act, 1925.

approved and adopted by Stirling, L.J., delivering the judgme of the Court of Appeal in *Taylor* v. *London and County Bankir Co.*, [1901] 2 Ch. 231, at p. 255; 70 L. J. Ch. 477.

Possibility.

Conveyance by A of "all lands whereof he or any one in tru for him had any estate either in law or equity in possession, rev sion, or remainder, and to which he had any right, title, *claim*, demand under his father's will." *Held*, to pass a possibility lands devised by the father's will, Lord Hardwicke saying, "I has taken upon him to convey everything, though he has unluck left out the most proper word, 'possibility.' It is true he h no immediate claim or demand, but the word 'claim' m describe it *in praesenti* or *futuro*, and there is a covenant for furth assurance. This, therefore, is well described": *Wright* v. *Wrig* (1750), 1 Ves. Sen. 409, at p. 413.

Remainder.

A tenant for years, in whom was also vested a remainder p *autre vie* in the land, granted the land *et totum statum suum* to for years. *Held*, that his estate in remainder passed: *Bernard Bonner* (1648), Aleyn, 58.

Sub-term.

Where A was owner in fee simple of lands subject to a lease B, who sub-demised to C for the term less twenty-one days, a assigned the lands to A for a term exactly co-extensive with C term, and A, by lease and release, conveyed the lands and "t reversion and reversions, &c.," to a mortgagee, habendum to t mortgagee, his heirs and assigns, for ever. *Held*, that the chat interest of A passed to his mortgagee as well as the fee: *Burton Barclay* (1831), 7 Bing. 745.

Term *en autre droit*.

A grant of *totum jus*, *titulum*, *et interesse suum de et in decim praedictis*. *Held*, to pass a lease of tithes held by the grantor right of his wife as executrix of her former husband: *Arnold Bidgood* (1612), Cro. Jac. 318.

So where a term was vested in a widow as administratrix, a she re-married and her husband released unto the lessor all his rig and title to the premises, it was held that the term was effectual surrendered: *Thrustout* v. *Coppin* (1772), 2 Wm. Bl. 801; Wils. 277.

Merged term.

In *Thellusson* v. *Liddard*, [1900] 2 Ch. 635; 69 L. J. Ch. 67 the words implied in the conveyance by section 63 of the Conve ancing Act (now section 63 of the Law of Property Act, 1925) we held to be sufficient to pass an equitable right to a term whic had probably merged at law, but which the parties interested there had treated as still subsisting.

Rent-charge.

Where a husband was entitled to a rent-charge issuing out his wife's hereditaments, and they both granted and released o moiety of such hereditaments and "all the estate, right, titl interest, property, claim, and demand" of either of them in t

editaments, it was held that such conveyance operated by of release of the rent-charge, leaving the whole rent-charge rged upon the remaining moiety: *Price* v. *John*, [1905] 1 744; 74 L. J. Ch. 469.

But of course the whole deed must be looked at and the frame the deed may show that the estate clause is to be limited in some y. Context.

An assignment by a lessee for years of "all the interest, term l terms that he then had" was held not to pass a term which ght arise at the end of the then existing term on the performance a condition: *Skerne's Case* (1560), Moore, 27. Conditional term.

And where A was entitled to the entirety of property for life, h remainder, as it was believed, as to one moiety to B in fee, and B conveyed by way of mortgage "all that undivided moiety B," and "all the estate, &c., of A and B." It turned out that s reversionary interest was in one-fifth only. *Held*, that A's interest in one-fifth only passed: *Grieveson* v. *Kirsopp* (1842), Beav. 283; 59 R. R. 497.

In *Francis* v. *Minton* (1867), L. R. 2 C. P. 543; (36 L. J. C. P. 1), A, being owner in fee of one moiety of a messuage, and lessee the other moiety subject to a covenant not to assign without ence, granted to B in fee by way of mortgage, all the messuage and all the estate, &c.," of A in the messuage. *Held*, that only fee simple moiety passed. But the decision was based on "the cts and the frame of the deed" (*per* Bovill, C.J., at p. 550), and pecially on the existence of the covenant against assignment. Covenant against assignment.

Where a tenant in tail reciting that she was entitled on a rticular contingency to an estate tail in certain hereditaments anted the lands so devised to her and all her estate and interest erein freed from all estates tail, it was held that an estate tail the same hereditaments to which she was entitled on another ntingency was not barred: *Grattan* v. *Langdale* (1883), 11 L. R. 473; referred to in *Re Wilmer's Trusts, Wingfield* v. *Moore*, 910] 2 Ch. 111; 79 L. J. Ch. 617. Restricted by recitals.

The words "and all other the estate, if any," of a compounding ebtor, following an assignment of certain properties specified in a hedule, "and all the estate, right, title, interest, claim and emand" of the debtor in such properties, were held insufficient to ass a life interest in certain property not mentioned in the hedule, but this construction was helped by the recitals; *Ex p. awes, re Moon* (1886), 17 Q. B. D. 275.

Conveyance by creditor's deed of "all the real and personal tate and effects whatsoever and wheresoever of or belonging or ue or owing to" the debtor; *held* to pass only his interest in the operty he possessed at the time, subject to certain equitable Creditor's deed.

mortgages which had not been registered in land in Yorkshire: *Jones* v. *Barker*, [1909] 1 Ch. 321; 78 L. J. Ch. 167.

A and B, being together entitled to the fee simple of land subject to certain mortgages on the fee and a term mortgage for £2,000 vested in B, conveyed, according to their respective estates and interests, the fee simple on a marriage and "all the estates" &c., of them. The deed contained no reference to the term mortgage for £2,000. *Held*, that the term did not pass: *Williams* v. *Pinckney* (1897), 67 L. J. Ch. 34, affirming 66 L. J. Ch. 551.

As to the estate and interest of an appointee of certain funds subject to the trusts of a marriage settlement: *Re Walpole's Marriage Settlement, Thomson* v. *Walpole*, [1903] 1 Ch. 928; 72 L. J. Ch. 522.

Trustee having also beneficial interest.

Where a person has some beneficial interest, in property vested in him as trustee, it may appear from the whole deed that what he intends to convey is only the interest vested in him as trustee, or only his beneficial interest, as the case may be.

In Lewin on Trusts (12th ed.), c. 12, s. 2, p. 251, it is said: "In dealings with the trust estate the Court has regard to the trust and will not construe general words to pass the trust estate where the assurance, if so construed, would amount to a breach of trust," and *Fausset* v. *Carpenter* (1831), 2 Dow. & Cl. 232; 3 R. R. 17; 5 Bli. N. R. 75, stated *infra*, p. 304, is cited. Mr. Lewin's proposition appears to be laid down too widely, and ought to be restricted to cases where the conveyance of the estate would *on the face of the assurance*, amount to a breach of trust. It is submitted that the true rule as to trust estates is as above stated.

Examples.

A release by a legatee of his legacy and all actions, etc. *Held* not to extend to an action which he had in his capacity of executor of another: *Knight* v. *Cole* (1690), Carth. 118; Holt, 620; 3 Mod. 277; 3 Lev. 273; 1 Show. K. B. 150; *Hutchinson* v. *Savage* (1710), 2 Ld. Raym. 1306.

Defendant, owning a moiety of certain property beneficially and being a trustee with others of another third, conveyed his undivided moiety and all his estate, etc., in the premises. *Held*, that his beneficial interest alone passed: *Doe* v. *Anderson* (1816), 1 Stark. 155.

A widow, entitled under her marriage settlement and otherwise to charges on her husband's estate, was one of the trustees of his will, whereby the estates were devised in trust to raise £2,000 for her benefit, and subject thereto, in trust to convey the estates a

hould direct. H borrowed money on a mortgage of one of the tes, in which the widow and her co-trustee joined, and whereby, r reciting the will and the agreement for the loan, and that H directed the widow and her co-trustee, "as such devisees in t as aforesaid, to make such conveyance as is hereinafter con-ed," the widow and her co-trustee, "as such devisees as afore-," granted the parcels with an estate clause. *Held*, that the d did not pass the beneficial interest of the widow, but that her rges were postponed to the mortgage, she having concurred rein without reserving her priority: *Stronge* v. *Hawkes* (1853), e G. M. & G. 186; 102 R. R. 80.

"Several cases were cited to show, what it hardly needed hority to show, that where a person assigns and conveys 'all his te, right, title, and interest,' and all his estate, right, title, and rest are not recited in the deed, still if he has other beneficial rests in the property, they pass. . . . It is well-known law t estates vested in a person in *autre droit* are so different from tes vested in him in his own right . . . that an assignment by erson of all his goods and chattels will not pass those he holds executor, unless he have none of his own; in which case, from necessity of the thing, they are held to pass; the ground of that trine being that the two things are so clearly distinct in the ty, that the intention, when he speaks of his own *simpliciter*, not to pass anything which he holds in *autre droit*. . . . But e all the conveying parties are described as executors, and are as such, made parties of the one part, and, as a body, convey whole estate vested in them in the capacity in which they are made parties. . . . If I had to determine it, I should not think self justified in holding that a conveyance by persons described executors, and assigning the estate they held *qua* executors for 600 years' term, would pass by force of the words 'and all the ate, right, title, and interest,' that which one of them held for own purposes and in his own right": *per* Wood, V.-C., *Rooper Harrison* (1855), 2 K. & J. 86, at p. 112; 110 R. R. 112.

K was solely seised as trustee under a will of real estate devised him in trust for the benefit of the testator's wife and children, whom K was one; by deed in consideration of natural love and ection he conveyed all and singular the real estate now vested K and all the estate and interest of K therein to trustees for own children; it was held that the conveyance did not pass legal estate vested in K as trustee: *Sidebotham* v. *Knott* (1872), L. T. 700; 20 W. R. 415.

A, being mortgagee in fee of certain lands, was appointed with executor of the mortgagor's will. A and B as such executors sed money on the mortgagor's equity of redemption by a con-

veyance of the land and "all the estate, &c., whatsoever both law or in equity" of the conveying parties. *Held*, that the leg estate did not pass: *Re Cooke and Bletcher's Contract* (189 13 R. 264.

Fausset v. *Carpenter*.

In *Fausset* v. *Carpenter* (1831), 2 Dow & Cl. 232; 5 Bli. N. 75; 35 R. R. 17, stated fully by Lord St. Leonards, Law Property, 76, the property had become, as to the benefic interest, divided into thirds; the owner of one share was the trust in whom the legal estate in another share was vested in trust fo married woman and her husband successively for life, wi remainder in trust for their children. A conveyance for value w made to a purchaser without any notice of the trusts on the conve ance or otherwise, the trustee conveying with an estate clause. was held by the House of Lords that the legal estate vested in h as trustee did not pass, on the ground that he had two estat one of which he might innocently and properly convey, and the oth of which he could not convey without fraud and a breach of tru and that it could not be presumed that he would intend the latt The case has been so strongly disapproved by Lord St. Leona (Law of Property, 76; V. & P. (14th ed.), p. 743; *Drew* v. *Earl Norbury* (1846), 3 J. & L. 267, at p. 284; 72 R. R. 62; 9 Ir. E Rep. 171), and by Lord Hatherley (*Carter* v. *Carter* (1857), K. & J. 617, at p. 635; 27 L. J. Ch. 74; 112 R. R. 308), that cannot be considered as bearing very high authority. It is su mitted that the decision in *Fausset* v. *Carpenter* is erroneous, the fact of the conveyance by the trustee being a breach of tru did not appear *on the face of the conveyance*; it was necessary look out of the deed in order to ascertain that fact, and hence t case is not within the exception. "It must be taken to ha been decided on its own peculiar circumstances," *per* Stirling, L. delivering the judgment of the Court of Appeal in *Taylor London and County Banking Co.*, [1901] 2 Ch. 231, at p. 255.

Land tax.

The estate clause is not effectual to grant, redeemed land t that has not been merged: *Blundell* v. *Stanley* (1849), 13 Ju 998; 18 L. J. Ch. 300; 84 R. R. 365; *Neame* v. *Moorsom* (186 L. R. 3 Eq. 91; 36 L. J. Ch. 274; tithes which have not be merged: *Chapman* v. *Gatcombe* (1836), 2 Bing. N. C. 516; 4 L. C. P. 93; 42 R. R. 645; 2 Scott, 738; or a right of entry on lessee for condition broken: *Hunt* v. *Bishop* (1853), 8 Exch. 67 22 L. J. Ex. 337; 91 R. R. 698; *Hunt* v. *Remnant* (1854), 9 Exc 635; 23 L. J. Ex. 135; 96 R. R. 891; and see *Jenkins* v. *Jon* (1882), 9 Q. B. D. 128, at p. 131; 51 L. J. Q. B. 438; *Davenpo* v. *Smith*, [1921] 2 Ch. 270; *Atkin* v. *Rose*, [1923] 1 Ch. 522; L. J. Ch. 209; but see now section 141 of the Law of Property A 1925, which has repealed and re-enacted with amendments section

Tithes.

Right of entry.

he Conveyancing Act, 1881, and section 2 of the Conveyancing , 1911.

Where a release extends to all a man's estate and interest, it be controlled by the recitals : *supra*, p. 208.

Release.

Upon the construction of a deed whereby a company released the liquidator released and confirmed to the plaintiff "all the rest, if any, which the company and the liquidator or either of n" had in the premises demised by a lease granted to the intiff who was in fact trustee for the company. *Held*, that it not purport to assign to the plaintiff any right of action for in respect of waste alleged to have been committed by the ndant, who had been in occupation of the premises under an eement entered into between himself and the company by its idator and receiver : *Defries* v. *Milne*, [1913] 1 Ch. 98; 82 L. J. 1.

Right of action for tort in respect of waste.

CHAPTER XV.

HABENDUM.

Office of Premises and Habendum explained: Property in Premi passes for Estate in Habendum: Variations from typical Dee Grantee named in Habendum only: Express Estate limited Premises: Parcels named in Habendum only: No Habendu Parcels named in Premises and Habendum: Grant to Habendum to A and others: Grantee named in Premises m take some Estate: Express Estate limited both in Premises a in Habendum.

Premises and habendum distinguished.

As before mentioned, all the parts of a deed (which it must remembered had formerly few, or no, recitals) before the habendu are called the premises, and in a properly drawn deed no wor of limitation should appear in the premises (though Preston (Sh Touch, p. 74) doubts if it be an error to limit an estate in t premises), and no parcels should appear in the habendum, t office of which is simply to limit the estate. The typical de should run—A grants to B (without any words of limitatio certain lands, habendum to B and his heirs, or as the case may

Habendum does not declare uses.

The declaration of uses (*a*), if there be one in the deed, is n a part of the habendum, though the word habendum is sometim incorrectly used as comprising the declaration of uses.

"The office of the premises of the deed is twofold : first, righ to name the feoffor and the feoffee; and secondly, to comprehe the certainty of the lands or tenements to be conveyed by t feoffment. . . . The habendum hath also two parts, *viz.*, first, name again the feoffee, and, secondly, to limit the certainty of t estate" : Co. Litt. 6 a.

"The premises of a deed are all the foreparts of the deed bef the habendum . . . And the office of this part of the deed rightly to name the grantor and grantee, and to comprehend t certainty of the thing granted. . . . And herein is sometim (though improperly) set down the estate. . . . The habendum a deed . . . doth properly succeed the premises. And the off hereof is to set down again the name of the grantee, the est

(*a*) The Law of Property Act, 1925, has repealed the Statute of Uses.

t is to be made and limited, or the time that the grantee shall e in the thing granted or demised, and to what use. . . . And ein also is sometimes, though needlessly, set down again the ng granted" : Shep. Touch. 74.

It follows that in the typical deed—

Everything mentioned in the premises passes by the deed, and the estate taken by the grantee is that conferred on him by the limitations contained in the habendum; and if that estate is contrary to the rules of law the deed is void.

Deeds pass property mentioned in premises for estate mentioned in habendum.

"If in the premises lands be letten or a rent granted (not making ntion of what estate), the general intendment is that an estate life passeth; but if the habendum limit the same for years or will, the habendum doth qualify the general intendment of the mises" : Co. Litt. 183 a.

"If the thing granted be left out in all, or in part in the pendum, yet the grant is good [by force of the premises]. And refore if one grant land to A, habendum (without naming the d), to A and his heirs, &c., or if one grant Whiteacre and ckacre to A, habendum, Whiteacre to A and omit Blackacre; these deeds are good, and all that is contained in the premises the deed doth pass in both cases" : Shep. Touch. 76.

"If one grant land to one, to have and to hold to him and his ht heirs, by this he hath a fee simple" : Shep. Touch. 102.

"If one grant land, rent, common, or any such like thing, to in the premises of the deed, without limitation of estate (which judgment of law is an implied estate for life), to have and to d to him for a certain number of years, or at will; this pendum is good, and shall stand with the premises and qualify [or rather explain it]; and by this [gift] the grantee shall have a lease for years, or at will, as the habendum is" : Shep. ich. 113.

Further general remarks on the office of the habendum will be nd in *Throckmerton* v. *Tracy* (1555), 1 Plow. 145; *S. C. sub n. Throgmorton* v. *Tracey*, Dyer, 124 a; Co. Litt. 21 a, 26 b, a and b, 190 b, 299 a, 378 b; Com. Dig. Fait, E. (9) and (10); av. Prec. (4th ed.), 99; (5th ed.), 79 *et seq.*

Grant of the site of a rectory with the tithes appertaining reto, habendum the rectory with the appurtenances for years. *d*, that the tithes passed: *Carie's Case* (1585), 1 Leon. 281; *C. sub nom. Carew's Case*, Moore, 222.

Grantees taking as tenants in common.

"And so it is if a lease be made to two, habendum the o moity to the one and the other moitie to the other, the habendi doth make them tenants in common" : Co. Litt. 183 b.

Grantees taking in succession.

Demise to A, B, and C, habendum to A for life, remain to B for life, remainder to C for life. *Held*, they took in succ sion : *Anon.* (1557), Dyer, 160 b, pl. 43; *Anon.* (1560), Moo 26, pl. 87; *Sutton and Dowse's Case* (1583), 1 Leon. 10; Litt. 183 b.

Where several persons are to take successively by way remainder at common law it is mostly correct to name only t first taker as grantee in the premises. Burton's Compendium (518) p. 175.

Demise to A and B, habendum to A and B for the term their lives and the life of the longest liver of them successively o after the other, as directed in the indenture and not jointly. *He* that they took in succession : *Anon* (1577), Dyer, 361 a, pl. 8.

Lease, habendum to three, as joint tenants for life, with proviso "that the second shall not occupy during the life of t first, nor the third during the life of the second." The proviso w held to be a mere collateral covenant, not altering the estate limit by the habendum : *Scovel* v. *Cabel* (1588), Cro. Eliz. 89, 10 *S. C. sub nom. Scovell and Cavel's Case*, 1 Leon. 317.

Demise to A or to A and his assigns, habendum to him a his assigns during his life and the lives of B and C. *Held*, t A took an estate for the three lives : *Utty Dale's Case* (1589), C Eliz. 182; *Rosse's Case* (1599), 5 Rep. 13 a; *S. C. sub nom. Ross Aldwick* (1597), Cro. Eliz. 491; *sub nom. Roos* v. *Awdwick* (159 Moore, 398; *sub nom. Rosse* v. *Ardwick* (1601), Gouldsb. 157.

Habendum giving estate *in futuro.*

Feoffment to G, habendum after the death of the feoffor to G tail, livery *secundum formam*. *Held*, void : *aliter* of the grant a term to A, habendum after the death of the grantor, in which c the term passes by the premises : *Hogg* v. *Cross* (1591), Cro. E 254.

Grant by tenant for life of a term to J, and afterwards grant tenant for life to C, habendum from a future day for life. *He* that the second grant was void, as an estate of freehold can commence *in futuro*. "The habendum in this case is not contra to the premises; for no certain estate is contained in the premis but generally the land given and granted, which might be qualif by the habendum to an estate for years, or at will. For the off of the premises of a deed of feoffment is to express the grant grantee, and thing to be granted, and the office of the habendi is to limit the estate; so that the general implication of the est which shall pass by construction of law, by the premises, is alwa controlled and qualified by the habendum. As a lease to tv

bendum to one for life, remainder to the other for life, will alter general implication of joint tenancy of the freehold, which hout any habendum would be made. And although the bendum be void, and so in effect as no habendum, yet no estate ll pass by implication of law against the express limitation of party, although his limitation be void" : *Buckler's Case* (1597), Rep. 5 a, at p. 55 b; *S. C. sub nom. Buckler* v. *Hardy*, Cro. Eliz. 5, Moore, 423.

Habendum giving estate *pur autre vie* to heirs.

Grant of a rent to A and his heirs, habendum to A, his heirs, ecutors and assigns, to the use of A and his assigns during the of B. *Held*, that if the habendum had been to A and his heirs ring his own life, it had been void; but otherwise of a stranger's , and that A took an estate *pur autre vie*, his heir being special cupant (*b*), and there can be no general occupant of a rent: *lkins* v. *Daure* (1609), Brownl. & G. 169 (the report is not ar).

"If a man grants a rent (and goes no farther) these general rds shall create an estate for life, but if the habendum be for ars, it shall qualify the general words": *Altham's Case* (1610), Rep. 150 b, at 154 b.

"If by your premises you have given no certain nor express te than that otherwise the law would give, you may alter and ridge, nay you may utterly frustrate it by the habendum": *ukeley* v. *Butler* (1614), Hob. 168, at pp. 170, 171.

"If no estate be mentioned in the premises, the grantee will e nothing under that part of the deed, except by implication d presumption of law; but if an habendum follow, the intention the parties as to the estate to be conveyed will be found in the bendum, and consequently no implication or presumption of law n be made; and if the intention so expressed be contrary to the les of law, the intention cannot take effect, and the deed will void": *Goodtitle* v. *Gibbs* (1826), 5 B. & C. 709, at p. 717; D. & R. 502, at p. 509; 4 L. J. (o.s.) K. B. 285; 29 R. R. 366.

Assignment of chattel interest to A, B, C, D, to be divided and joyed in manner following, *viz.*: A's one-fourth to consist of eenacre, B's of Blackacre, C's of Whiteacre, D's of Redacre; bendum the said lands to A, B, C, D, as follows, *viz.*: to A his e-fourth for his life, and after his death if he should leave lawful ue him surviving to such of them as he should appoint; but if should die without issue, the said fourth to be divided and scend to the survivor and survivors of the said B, C, and D, which ould be then living. A survived B and C, and died in the etime of D without having had issue. *Held*, that the habendum

(*b*) Special occupancy is abolished by section 45 of the Administration of ates Act, 1925, as regards deaths after 1925.

was not inconsistent with the premises; that the gift over if A should die without issue was not void for remoteness; and that D was entitled to A's share of the lands: *Kerr* v. *Kerr* (1854), 4 Ir. Ch. R. 493; 7 Ir. Jur. 76.

Demise and grant to A and B, habendum "to A and B, their heirs and assigns, from November 1 preceding for the lives of B, C, and D, or for 999 years, or for ever, which should longest last," at a yearly rent, "payable half-yearly during the said term." *Held*, to be a grant in fee farm: *Twaddle* v. *Murphy* (1881), 8 L. R. Ir. 123.

Variations from typical deed.

The following variations from the typical form sometimes occur: (i) no person is named in the premises as grantee; (ii) words of limitation are added to the grantee's name in the premises; (iii) the parcels are omitted from the premises; (iv) the habendum is omitted altogether; (v) the parcels are named over again in the habendum; (vi) persons different from those named as grantees in the premises are named as grantees in the habendum; or (vii) words of limitation having been added to the grantee's name in the premises, different words of limitation are added to his name in the habendum; and all these variations must be considered.

As to words of limitation under the new Property Acts, see Chap. XVI, *infra*.

Mentioning grantee in habendum only is sufficient.

If no person is named as grantee in the premises the person named as grantee in the habendum takes the parcels for the estate limited by the habendum.

"If A give lands to have and to hold to B and his heirs, this is good, albeit the feoffee is not named in the premises": Co. Litt. 7 a; and see further on this point, Co. Litt. 26 b, note 4, "Where one named after the habendum shall take."

"And if the name of the grantee be not contained in the premises, yet if it be in the habendum, it may be good enough. As if one give or grant land habendum to B and his heirs, and he is not named in the premises, yet this is a good deed to make an estate in fee simple": Shep. Touch. 75.

A lease held good, notwithstanding the lessee was not named in the premises of the lease, but only in the habendum: *Butler* v. *Dodton* (1578), Cary, Rep. in Ch. 122; *Eeles* v. *Lambert* (1647), Aleyn, 38, at p. 41.

In *Spyve* v. *Topham* (1802), 3 East, 115; 6 R. R. 559, the Court of King's Bench first rejected some words from the premises which would have made the deed inoperative, and then supported the deed from finding the name of the grantee in the habendum.

If words of limitation are added to the grantee's name in the premises, the estate so granted cannot be abridged, but may be explained or extended by the limitations in the habendum.

If words of limitation contained in premises tha estate cannot be abridged.

The cases are collected *infra* with the cases in which the estate limited by the premises differs from that limited by the habendum.

If the thing granted is not named in the premises, it will not pass, though named in the habendum.

Parcels omitted from premises do not pass.

This rule is laid down in Shep. Touch. 75, on which Mr. Preston says : " Probably this proposition is too general "; but see 3 Prest. Abst. 40. Shep. Touch. *l.c.* continues, " And therefore if a man grant Blackacre only in the premises of a deed, habendum Blackacre and Whiteacre, Whiteacre will not pass by this deed." This passage is cited with approval in 1 Dav. Prec. (4th ed), p. 101; (5th ed.), p. 81.

" The King being seised of a manor in fee to which an advowson was appendant, granted the same manor to two for their lives, and afterwards the King reciting the grant for life, granted that the said manor, after their deaths, should remain to two bishops, *habendum et tenendum omnia praedicta terras et tenementa, una cum advocatione ecclesiae praedictae*, &c., and it is there held by all the Justices that by the lease of the manor the advowson did not pass, because nothing was spoken of it in the grant, but it remained in the King as in gross, and not appendant in right nor in possession; and there it is also clearly held that the advowson should not pass to the bishops, because nothing was spoken of the advowson in the grant, but in the habendum, and that nothing shall pass in the habendum if it be not spoken of in the grant, except it be a thing appendant or appurtenant " : *R.* v. *Abbess of Sion*, Y. B. 38 Hen. 6 (1460), 33 b; cited *Throckmerton* v. *Tracy* (1555), Plowd. 145, at p. 152. It is not clear why the advowson did not pass by the lease for lives, but probably it was specially excepted from that lease, and thus became an advowson in gross. See other cases to the same effect, Viner, " Grants," I a, pl. 5.

Feoffment of a manor (except and reserved two acres to the feoffor for his life only) habendum before excepted to the feoffee in tail. *Held*, that the two acres did not pass : *Wilson* v. *Armorer* (1670), 2 Keble, 642, 643, 667, 719.

Parcels mentioned by implication.

Of course the rule does not apply where the thing newly mentioned in the habendum is impliedly mentioned in the premises.

"If one grant a manor, habendum the manor with the advowson appendant to the manor, or if one grant a reversion of land, by the name of a reversion, in the premises, habendum the land itself; in both these cases the deed is good, and the advowson and reversion will pass, [for they were in effect and in point of law included in the former description]": Shep. Touch. 76; Br. Ab. 342 b, pl. 73. And see *Gregg* v. *Richards*, [1926] 521; 95 L. J. Ch. 209.

Conveyance of land, with the right to use a wall, to A, subsequent conveyance by A of the land, habendum "with the appurtenances." *Held*, that the right to use the wall passed: *Renwick* v. *Daly* (1877), Ir. R. 11 C. L. 126.

If no habendum, grantee takes estate mentioned in the premises.

If there is no habendum, the grantee takes the estate limited in the premises.

"If a man by deede give lands to another and his heires without more saying this is good, if he put his seale to the deede, deliver it and make livery accordingly": Co. Litt. 7 a.

"An estate may be made by a deed without any habendum at all. As if one give or grant land to another and his heirs, without any more words in the deed, or if one give or grant land to another and limit no estate, without any habendum in the deed, and seal and deliver this deed, and make livery accordingly; in both these cases the deed is good, and in the first case an estate in fee simple is made, and in the last case an estate for life is made": Shep. Touch. 75.

"The habendum, it is obvious, cannot be requisite in those deeds which operate merely by declaration of use, as an appointment, a covenant to stand seised, or a bargain and sale; though it commonly occurs in the latter. Nor in a common law conveyance is it absolutely necessary, though the deed would be very informal without it, as it is a clause of great importance": Burton, Comp. s. 515.

"If an estate and interest be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any habendum": *per* Abbott, C.J., *Goodtitle* v. *Gibbs* (1826), 5 B. & C. 709, at p. 717; 8 D. & Ry. 502, at p. 509; 4 L. J. (o.s.) K. B. 285; 29 R. R. 366; see also *Kerr* v. *Kerr* (1854), 4 Ir. Ch. R. 493, at p. 497.

Repeating parcels in habendum is nugatory.

If the parcels are set out again in the habendum such setting out is of no effect, unless it is for the purpose of differentiating the estate to be taken by the grantee in the several parcels, but such setting out may explain the parcels in the premises.

Lease by A, seised of a reversion in fee simple upon a lease for

life, to B of the *reversion*, habendum the *land* for twenty-one years. *Held*, that the words in the habendum explained those in the premises and created a good lease for twenty-one years after the death of the lessee for life : *Throckmerton* v. *Tracy* (1555), 1 Plow. 145; Dy. 124 a. The point of the decision turns upon the fact that the lessee for life had died without having attorned to B; and hence, as attornment was then necessary to the validity of the grant of a reversion, the lease would have been void if the deed had been held to be a lease of a reversion and not of the land. Attornment was rendered unnecessary by 4 & 5 Anne (1705), c. 16, s. 9 (replaced by section 151 of the Law of Property Act, 1925).

Where A leased the manor of D with all its members and appurtenances, habendum the members of the said manor for a term of years, the Judges were divided in opinion as to whether the manor or only the members thereof were well leased for years. Two Judges held that the manor was well leased for years, but other two held that the manor was only leased at will (that being the effect of the premises), the members only being leased for years; and the latter is stated to be the better opinion : *Anon.* (1563), 2 Benl. & Dal. 57, pl. 3; Moore, 55.

In *Carew's Case* (1585), Moore, 222, Manwood, C.B., said that " where there were in one deed several things granted, and then comes the habendum to limit the estate, if the habendum recites those things over again particularly [' *arrear particularment* '], it does something which is not its office and is superfluous, and therefore all that recital shall be of no effect; but the habendum shall be construed as if there had been no such recital, nor anything beyond ' habendum et tenendum,' but where a deed or demise contains several limitations of estate, *e.g.*, one of certain parcels of the premises for twenty years, and another of other parcels for ten years, or for life, there the certainty of the different habendums is to be regarded, but not so where there is but one habendum." See the annotation of Lord Hale given in Co. Litt. 26 b, note (4).

Therefore a lease of the site of a rectory and all buildings, etc., and tithes thereto appertaining, habendum the said site with the appurtenances, was held to be a good lease of the tithes : *Carew's Case* (1585), Moore, 222; *S. C. sub nom. Carie's Case*, 1 Leon. 281.

Grant to J N of an annuity or annual rent of £14 to be issuing out of certain lands, habendum *l'un moyety del ceo* (*viz.*) *£7 del date del dit indenture per 38 ans et habendum l'auter moyety* (*viz.*) *£7 post mortem J D durant le terme de 38 ans. Held*, that there were two several rents of £7, one to commence immediately

and the other after the death of J D : *Woodley* v. *Beere* (1629) Wm. Jones, 207.

Deed of partition whereby the coparceners conveyed to th releasee to uses certain closes A and B and all ways to the sai lands belonging or appertaining or therewith usually held, used occupied or enjoyed, habendum as to closes A and their appur tenances to the releasee to uses in fee to the use of S in fee. *Held* that a right of way which was not strictly appurtenant to A having been extinguished by unity of possession, passed by th word "appurtenances" in the habendum, interpreting that wor by the words in the premises : *James* v. *Plant* (1836), 4 A. & E 749, reversing 5 B. & Ad. 791 ; 6 L. J. Ex. 260 ; 43 R. R. 465.

Person not named in premises cannot take, except in remainder or by way of use.

Where a person is mentioned as grantee in th premises, a person mentioned in the habendum, bu not in the premises, cannot take an immediat estate in the land granted, but can take an estate i remainder : Co. Litt. 231 a ; but any person, thoug not named in the premises or in the habendum, ca take any estate, either immediate or in remainder by way of use declared on the estate limited in th habendum : *Sammes' Case* (1609), 13 Rep. 54 [Uses are abolished by the Law of Property Act 1925.]

A made a lease to B for forty years if he should so long live and afterwards by another deed demised the same land to B habendum to his executors and assigns for forty years after th expiration of the first lease. *Held*, a void lease : *Anon.* (1573) 3 Leon. 32, LX. "The premises of a deed is to limit the perso who shall have the lease, and the habendum shall not declare th person who shall have it, or the lease, but to declare the estat which shall be in the lease ; and it is but a limitation of the estate and if the premises do not limit the person who shall have it, th habendum shall not give anything to the person, unless it b expressed in the premises what person shall have it : and therefor when he saith habendum to his executors and assigns these word (executors and assigns) are void" : *per* Mounson, J., *ibid.*, a p. 33. "By the lease of the same land by a new deed, as th case is here, nothing shall pass without an habendum : and if lease be made to the lessee, habendum to his executors, he himse hath no estate ; and when no estate is limited the person in th premises gains not anything and without the habendum he cann have anything" : *per* Harper, J., *ibid.*, at p. 33. "And when b

he premises of the deed the parties are not named, the habendum hall never bring in a strange person. . . . When the habendum is o such a person as was not named in the premises of the deed it is ut a nugation. . . . The habendum waits upon the grant before; nd when he gives an estate in the habendum without limiting of he person in it, then the person named in the premises shall have t; and then when he names a strange person which was not amed before in the premises or which hath no capacity as the noon, or such like who are not *in rerum natura* . . . these persons r things named in the habendum are but nugations and void; and hen it is like unto the case where no person is limited in the abendum" : *per* Manwood, J., *ibid.*, at p. 34. "Where no person s named in the habendum, by construction of law he who is named n the premises shall have it : but when the habendum makes xpress mention of his intent what person shall have it, and another han was named in the premises, then if those cannot have it, the state limited shall not be carried over to him who was named in he premises" : *per* Harper, J., *ibid.*, at p. 35.

Leases for lives.

Demise to A, habendum to A, B, C, and D, "*pro termino vitae orum et alterius eorum successive diutius viventium.*" *Held*, that A alone took, as B, C, and D, not being named except in the abendum, could only take in remainder, which could not be joint ecause of the words "*successive*," etc., and in succession they ould not take for the uncertainty who should begin : (distinuishing *Anon.* (1577), Dy. 361 a, *supra*, p. 308); *Windsmore* v. *Iobart* (1584), Hob. 313; Godb. 51; Hut. 87; Cro. Eliz. 58; *S. C. ub nom. Anon.*, Ow. 38.

Lease made to two, habendum to them and two others for their our lives. *Held*, that the two mentioned in the habendum only ook nothing : *Kirkman and Reignold's Case* (1587), 2 Leon. 1; . *C. sub nom. Kirkman and Reignott's Case*, 4 Leon. 3. Demise o C, habendum to C and D for years rendering rent. *Held*, that D took nothing : *Reynold* v. *Kingman* (1587), Cro. Eliz. 115.

Release of copyholds.

Release by lord of a manor of a copyhold to the tenant on the oll, habendum to the tenant and G, their heirs and assigns; and very made according to the intent of the indenture. *Held*, that s G was not named in the premises, he could take nothing by the abendum, and that the livery made according to the indenture d not give anything to G, because the indenture as to him was oid : *Sammes' Case* (1609), 13 Rep. 54; Ley, 11.

The case of *Tyler* v. *Fisher* has been cited as an authority gainst the proposition now under discussion on account of the arginal note in the report of the case in Cro. Jac., which states at some of the lessees were not named in the premises, but such atement is not correct, and the case really has nothing to do

with the proposition, but is simply a case in which the questio for determination was whether the lease was good or void fo uncertainty. It was a case in which A and his wife, by indentur between them and B, demised to B and his wife and C the daughter (all of whom were named in the premises), habendum t them "*ut supra dictum est et eorum diutius viventi successive* for term of their lives. The lease was held good, they to tak by way of remainder one after the other: *Tyler* v. *Fisher an Greenwood* (1619), Palm. 29; *S. C. sub nom. Greenwood* v. *Tybe* Cro. Jac. 563; *sub nom. Greenwood* v. *Tyler*, Hob. 314. Th case, however, on writ of error, was compromised on the advic of the Judges, who were of opinion that the decision could no stand with *Windsmore* v. *Hobart, ubi sup.*

Exceptions; frank marriage and grant by copy.

There were formerly two exceptions to this proposition, i which a person not named in the premises took an immediat estate—(i) in case of frank marriage, 2 Roll. Abr. 67, pl. 17 (ii) under a customary grant by copy, *Brooks* v. *Brooks* (1617 Cro. Jac. 434; Pop. 125; 2 Roll. Abr. 67, pl. 18. The authoritie are collected, Co. Litt. 26 b, note (4).

Remainderman mentioned in habendum only.

A person not named in the premises can take in remainde after a particular estate limited by the habendum to the perso named as grantee in the premises: Co. Litt. 26 b, note (4); Burton Comp. s. 518.

Thus, a grant to B, habendum to B and the heirs of his body and if B died without heirs, remainder to J, was held good *Veners* v. *Abbot of Fesch*, Y. B. 8 Edw. 2 (1314), 267.

Lease by deed poll to A, habendum to A, his wife, and h daughter "*successive sicut scribuntur et nominantur in ordine.* *Held*, a good remainder to the daughter: for the words "*sicu* etc., *in ordine*" made it sufficiently certain, though a lease t three habendum *successive* would not be good, for uncertainty *Grubham's Case* (1613), 4 Leon. 246; distinguishing *Windsmo* v. *Hobart, ubi sup.*

Lease to A, habendum to A and his wife for their lives "*e eorum diutius viventi successive uni post alterum sicut scribunt et nominantur in ordine.*" *Held*, a good remainder to the wife *Wheadon* v. *Sugg* (1614), Cro. Jac. 372.

The Real Property Amendment Act, 1845, s. 5 (now re-enacte and extended by section 56, Law of Property Act, 1925), whic enacts that in indentures executed after October 1, 1845, "a immediate estate or interest in any tenements or hereditaments . . may be taken, although the taker thereof be not named a party t the indenture," does not affect this rule. See also Carson's Re Property Statutes (3rd ed.), p. 650, and cases cited.

Where a person is mentioned as grantee in the premises he must take some estate, though he is not mentioned in the habendum.

Grantee named in premises must take some estate.

A *feme covert* by deed executing a power of appointment ppointed to such children of her sisters as should be living at he death of her and her husband or the longest liver, habendum o such children of her sisters as should be living at her decease. *Held*, that a child born after her own but before her husband's eath took, " for the office of the habendum is to ascertain the quanity and quality of the estate " : *Cochin* v. *Heathcote* (1772), Lofft, 90. It was, however, held in a case in which there was a lease to usband and wife, habendum to the husband for thirty years, hat the wife took nothing : *Baldwin* v. *Mortin* or *The Earl of umberland's Case* (1589), Owen, 48; probably on the ground that uch estate as she took under the premises vested in her husband.

If words of limitation are added to the grantee's name both in the premises and in the habendum, the limitation in the habendum will, if possible, be considered as explanatory of that in the premises; but if the limitations are repugnant, the estate given by the premises cannot be abridged by the habendum.

If express limitations in both premises and habendum, the latter will be treated as explanatory, or, if repugnant, rejected.

This rule only applies where there are words of limitation dded to the grantee's name in the premises. If there is no such ddition, though some of the cases speak of an estate for life in he grantee being implied by the mention of his name in the remises, the better opinion is that there is no such implied life state; hence the mere mention of the grantee's name in the remises does not give him any estate inconsistent with the estate mited by the habendum, whatever that estate may be.

Mere mention of grantee in premises is not a life estate.

" For to the intent of some, if a man letteth land to another for fe and after confirm his estate which he hath in the same land to ave and to hold *his estate* to him and his heirs, this confirmation as his heirs is void, for his heirs cannot have his estate, which was ot but for term of his life. But if he confirm his estate by these ords to have *the same land* to him and to his heirs this confirmaon maketh a fee simple in this case to him in the land " : ittleton, s. 524. " Wherein is to be noted that the habendum and e premises do in substance well agree together, and that the abendum may enlarge the premises but not abridge the same " : . Litt. 299 a.

" The office of the habendum is properly to determine what

estate or interest is granted by the deed, though this may b performed, and sometimes is performed, in the premises. In whic case the habendum may lessen, enlarge, explain, or qualify, but no totally contradict or be repugnant to the estate granted in th premises. As if a grant be 'to A and the heirs of his body' i the premises, habendum 'to him and his heirs for ever,' or *vic versa*, here A has an estate tail, and a fee simple expectant thereon But had it been in the premises 'to him and his heirs,' habendu 'to him for life,' the habendum would be utterly void; for a estate of inheritance is vested in him before the habendum come and shall not afterwards be taken away or devested by it'" 2 Bl. Com. 298.

Blackstone's proposition.

"But a modification introduced by the habendum is permitte to take effect if it is so far consistent with the language of th premises that its admission does not make any part of the languag simply void or nugatory. In such cases there is not, properl speaking, a repugnancy between them": Challis, R. P. (3rd ed.) p. 413.

"So that the habendum is the only proper part of a fine or dee by the law designed for the limitation of the estate, and the estat limited by the habendum is the estate which the fine or feoffmen conveys, if not contradictory to the premises. And this all book agree, that it is the office of the premises to name the grantor an grantee and the thing granted, that the office of the habendum is t limit and express the estate granted, that the habendum sha never be controlled by the premises, unless that the premises ar particular, plain, and certain in the limitation of the estate, an the habendum repugnant thereunto, but if the premises be no certain and particular in expressing the estate granted, but genera or incertain or subject to doubtful and various constructions, tha then in all such cases the habendum, according to its office, shal govern, direct, or enlarge that which is mentioned in the premises and the estate which passes is according to the habendum. . . Where the words in the premises are capable of divers construc tions, the habendum, being certain and particular, shall govern those doubtful words": *per* Pollexfen, *arguendo*, *Pigot* v *Salisbury* (1674), Pollexf. 146, at pp. 150, 151.

"The office of the habendum is to explain, limit, and declare the *quantum* of the estate which is to pass by the deed. It has never been disputed but that it will carry the limitation of the estate farther than the premises of the deed did. If a man gives an estate to A for life, habendum to him and his heirs, a fee simple clearly passes. On the other hand, it is clear *that the habendum never abridges the estate granted by the premises of the deed*; it may indeed alter and vary it. As if a man grants an estate to

A and B, to have and to hold to A for life, the remainder to B, he premises of the deed in that case will be controlled by the abendum" : *per* Verney, M.R., *Kendal* v. *Micfeild* (1740), Barn. Ch. Rep. 46, at p. 47. [The part in *italics* seems to conflict with Blackstone's proposition.]

Estate may be altered but not abridged.

Of course, part of the habendum may be explanatory of the imitation in the premises, while other part may be repugnant and nay have to be rejected : *Doe* v. *Steele* (1843), 4 Q. B. 663; 12 L. J. Q. B. 272; 62 R. R. 456; stated *infra*, p. 323.

In the following cases the estate limited in the habendum xplained that in the premises.

Premises explained.

Grant in frank-marriage (which was equivalent to a grant in pecial tail : see Litt. ss. 17, 19 and 20), habendum to the said ohn and Joan *et haeredibus*. *Held*, to be a grant in fee simple : Y. B. 45 Edw. 3 (1371), 19, 20, pl. 22. This case is inconsistent vith *Blaunket* v. *Simonson*, Y. B. 2 Edw. 2 (1308), 29 (wrongly umbered 26); 17 Selden Society Publications, p. 126, where a imilar grant was held to be a grant in frank-marriage only.

"Land is given to one and his heirs male in the premises, abendum to him and the heirs male of his body, this is only an state tail, notwithstanding the premises were a fee simple" : *Throgmorton* v. *Tracey* (1555), Dyer, 124 a, at p. 126 b, pl. 50.

Grant of a rentcharge to A and his heirs, habendum to A for fe and for the lives of his wife and two daughters. *Held*, that fter the death of A his heir took during the three other lives, not s "heir by descent, but as his heir *nominatim*, and as by way of mitation only, and not in any other manner, he is to have it as eir by force and virtue of the grant, and not as by descent, but by ay of limitation, and that for to prevent an occupancy" : *per* lemming, C.J., *Bowles* v. *Poor* (1611), 1 Buls. 135, at p. 137; . C. *sub nom. Bowles* v. *Poore*, Cro. Jac. 282. But according to e latter report it was held "that the heir shall have this rent as a arty specially nominated, and as heir by descent, although it be ot properly an estate descendible."

Heirs taking as special occupants (*c*).

Demise by a prebendary to A and his heirs, habendum to him nd his heirs for three lives. *Held*, good against the lessor's ccessor, "for the habendum expounds the premises, and there's repugnancy, for the lessee and his heirs shall take as in the remises, but shall take only for three lives, as in the habendum" : *ilsworth* v. *Pyet* (1671), T. Jones, 4.

"If a man in the premises give land to another and the heirs his body, habendum to him and his heirs for ever, he takes estate tail and a fee simple expectant" : Co. Litt. 21 a. (It

Habendum enlarging premises.

(*c*) Special occupancy is abolished by the Administration of Estates Act, 1925, regard to the estate of a person dying after 1925.

is said in *Kendal* v. *Micfeild* (1740), Barn. Ch. Rep. 46 (at p. 48) that it is fee simple; possibly Coke's opinion may be supported on the ground that estates in tail and in fee may co-exist in the same person.)

"Heirs" in the premises explained to mean "heirs of the body."

"If a man gives lands to one and his heirs, habendum to him and the heirs of his body, he shall have but an estate in tail and no fee expectant": *Altham's Case* (1610), 8 Rep. 150 b, at p. 154 b; see Co. Litt. 21 a; Preston, Shep. Touch. 102, 112. In *Turnman* v. *Cooper* (1618), Cro. Jac. 476; *S. C. sub nom. Thurman* v. *Cooper*, 2 Roll. Rep. 19, 23, and Pop. 138; *sub nom. Jermyn and Cooper's Case*, Godb. 272; these words were held to give an estate tail with a remainder in fee; but in that case the construction was made on the whole deed, which was inconsistent with an estate tail only being intended.

Special occupant explained.

Owner of rentcharge *pur autre vie* grants to "A, his executors, etc., habendum to A, his heirs and assigns," during the lives. *Held*, that the heir took, the habendum being good, because "it is considered as the same kind of estate whether a grant of that sort is made to a man and his heirs, or whether it is made to a man and his executors; it follows from thence that when one of these limitations is in the premises of the deed and the other of these limitations is in the habendum, the habendum shall take place": *Kendal* v. *Micfeild* (1740), Barn. Ch. Rep. 46.

Estate *pur autre vie* and term restricted.

In *Earl of Derby* v. *Taylor* (1801), 1 East, 502; 6 R. R. 337, an estate *pur autre vie*; and in *Burton* v. *Barclay* (1831), 7 Bing. 745, a term; granted by the premises were restricted by the habendum (in each of these cases the facts were somewhat special).

A, seised in fee of certain lands, leased them for three lives at a rent with covenant for perpetual renewal. Subsequently by a settlement he granted and conveyed the said lands to B and C (trustees) and the survivor and the heirs of such survivor, habendum to B and C, and the survivor and the heirs of such survivor for the life and lives of the three *cestuis que vie*, and of every such other person and persons as should be added by virtue of the covenant for perpetual renewal, to the use, in the events which happened, of D and the heirs male of her body. *Held*, that the settlement operated as a grant by A of the reversion, and that D's estate was a *quasi*-tail therein: *Lynch* v. *Nelson* (1870), Ir. R. 5 Eq. 192.

Void habendum.

Even if the habendum is void, it may be looked at together with other parts of the deed for the purpose of qualifying the estate limited by the premises: *Goshawke* v. *Chickell* (1629), Wm. Jones, 205; *Hagarty* v. *Nally* (1862), 13 Ir. C. L. R. 532.

Demise to A, his wife and B, habendum to A for eighty years, if he so long live, and if he dies within the term, remainder of

ıe term to A's wife and B, if they so long live. *Held*, good, and ıat all the interest in the term was in A, and nothing in the thers till after his death : *Anon.* (1561), Moore, 43, pl. 133.

In the following cases the estate limited in the habendum being ss than that limited in the premises, or repugnant to some rule f law, the habendum was rejected. Habendum rejected.

"If the grant is to one and his heirs, habendum for life, the abendum is void because it gives a lesser estate. . . . If a man rants to another an annual rent of 20s. payable yearly at the asts of the Annunciation of Our Lady and of St. Michael, abendum for a day, this is a void habendum, because the premises the deed grant an annual rent and payable at two days, and ow by the habendum it shall not be annual nor payable at any ay, and therefore it is repugnant" : *Throckmerton* v. *Tracy* 555), 1 Plow. 145, at p. 153 (*arguendo*).

In *Lilley* v. *Whitney* (1567), Dy. 272 a, pl. 30, where a term as assigned to A, habendum to him and his assigns after the eath of the grantor, the habendum was rejected. Habendum *in futuro.*

On the same principle, part of the habendum was rejected in nderhay v. *Underhay* (1591), Cro. Eliz. 269, in which case a emise was made habendum to lessee for life, "which said term all begin" after the determination of an existing lease for three ves; and it was held that the lease was good, for the estate was lly limited before the words, "which said term shall begin," ıich therefore had no effect and were rejected.

A, in whom the reversion upon an estate for life was vested, anted the reversion to B, habendum the said reversion after e death of the tenant for life. *Held*, that the reversion passed ımediately : for if the words, "after the death of the tenant r life," could have had any operation they would have been ougnant to the grant of the reversion contained in the premises : *ıshper* v. *Milburn* (1591), 1 Anderson, 284.

A by one indenture conveyed freeholds to B and his heirs, bendum after the death of A to B and the heirs of his body, d by another indenture other freeholds to B and his heirs, bendum after the death of A to B and the heirs male of his dy. *Held*, that "although the habendum of a future freehold be id, yet the grant in the premises being expressly to him and his rs, the indenture shall enure upon the premises and shall pass e estate to the vendee directly by the premises" : *Carter* v. *dgwick* (1692), 3 Lev. 339.

In *Jerman* v. *Orchard* (1695), Skin. 528 (see p. 542); *S. C. sub n. Germain* v. *Orchard*, Holt, 331; 1 Salk. 346; *sub nom. rmyn* v. *Orchard*, Show. P. C. 199, where a term was assigned to her executors, etc., habendum after the death of the grantor and

his wife, the habendum was rejected, and the assignee took tl estate given by the premises.

A conveyed freeholds to B and his heirs, habendum to B, h heirs and assigns after the death of A; the habendum, which w void as giving an estate *in futuro*, was rejected : *Goodtitle* v. *Gibl* (1826), 5 B. & C. 709; 8 D. & Ry. 502; 4 L. J. (o.s.) K. I 285; 29 R. R. 366.

Assignment of a ship in course of building to A, habendum to A when it shall be complete. *Held*, that the habendum might b rejected : *Reid* v. *Fairbanks* (1853), 13 C. B. 692; 22 L. J. C. I 206; 93 R. R. 695.

Grant to heirs habendum for life.

Where Queen Elizabeth granted a manor to B and his heirs (i the premises of the letters patent) to have and to hold the sa manor to B and his assigns (leaving out heirs in the habendum the fee of the manor did pass by the premises of the letters paten and the habendum was void; for the premises were certain enoug to pass the fee simple, and the omission of heirs in the habendu should not overthrow that which was certain in the premises *Auditor King's Case*, cited in *The Earl of Rutland's Case* (1608 8 Rep. 55 a, at p. 56 b. "Although the habendum cannot retra the gift in the premises, it may construe and explain the sense which the words in the premises should be taken" : *Spencer* v *Registrar of Titles*, [1906] A. C. 503, at p. 507, *per* Lord Davey 75 L. J. P. C. 100.

In *Goshawke* v. *Chickell* (1629), W. Jones, 205; *S. C. sub nom Goshawke* v. *Chiggell*, Cro. Car. 154, where a term was assigned b J to his daughter Hester, habendum to J and his wife for the lives with remainder to Hester till her marriage and birth of issu and afterwards to Hester, her executors, etc., for the residue of th term, provided that if Hester died before being married and havin lawful issue the assignment should be void, the habendum w rejected, and Hester took the estate given by the premises, but th habendum was used to assist in interpreting the proviso.

A, tenant for years, in whom was also vested a remainder *pu autre vie* in the land, granted the land and all his estate to and C, habendum for sixty years. *Held*, that by the grant of a his estate his remainder passed, and the habendum was repugnant *Bernard* v. *Bonner* (1648), Aleyn, 58.

Grant to heir, habendum to assigns.

Demise to Hannah Timmis, her heirs and assigns, habendu to Hannah Timmis and her assigns for and during the natur life of George Timmis. *Held*, that the grant in the premises w explained by the habendum to be an estate *pur autre vie*, an that the words in the habendum, "and her assigns," which wou have made the lands to pass on the death of the grantee to h executors, should be rejected as being repugnant to the grant

er, her heirs and assigns in the premises, and that the grantee's eir was entitled after her death as special occupant : *Doe* v. *Steele* 1843), 4 Q. B. 663; 12 L. J. Q. B. 272; 62 R. R. 456.

R, being tenant for life of a house by deed of November 10 granted, demised, and leased to J, his executors, administrators nd assigns," the house, habendum "to J, his executors, adminisators, and assigns, from the 13th November for the term of R, r the term of his natural life." *Held*, that having regard to the terest which the grantor had, there was in the premises an express ant of the life estate *in praesenti*, which was not controlled by e habendum : *Boddington* v. *Robinson* (1875), L. R. 10 Ex. 0; 44 L. J. Ex. 223. It is doubtful whether this case can be pported; see Challis, R. P. (3rd ed.), pp. 108, 9.

Where one limitation takes effect on delivery but the other does not.

Where the estates limited in the premises and the habendum e not the same, and some further act, besides the delivery of e deed, is necessary to perfect one of them, while the other takes ect by the delivery alone, then the latter estate only is effectually nited.

In *Baldwin's Case* (1589), 2 Rep. 23 a, land was demised to and B and the heirs of B, habendum to them for ninety-nine ars from the date of the indenture; no livery of seisin was ade. It was held, "*First*, when to things which take their ence and effect by the delivery of the deed without other emony, and which lie in grant, there, in such limitation as in e case at Bar, the habendum was repugnant and void; as if a n grants rent or common, etc., out of his land, by the premises the deed to one and his heirs, habendum to the grantee for ars, or for life, the habendum is repugnant; for a fee passeth the premises, by the delivery of the deed, and therefore the endum for years, or life, is void. *Second* : If one by deed nts a rent *in esse*, or a seignory, in the premises to one and heirs, habendum to the grantee for years or life; although ther thing, or ceremony, is requisite, that is to say, attornment, ides the delivery of the deed, yet, forasmuch as the thing lieth grant, and both estates, that is to say, as well the estate in fee the estate for years or for life, ought to have one and the same emony, that is to say, attornment, to pass it, as a seignory, , and for this cause the habendum, in such case, is repugnant void. *Third* : When a man gives land by deed in fee by the mises, habendum to the lessee for life, there the habendum is l, as hath been said; for one and the same ceremony, *scil.* ry, is requisite to both the estates; and therefore, when livery ade according to the form and effect of the deed, it shall be n strongest against the feoffor, and more for the advantage he feoffee; and the habendum in such case is void, and till

livery be made, the feoffee hath but an estate at will. *Fourt* When to the estate limited by the premises, a ceremony is requis to the perfection of the estate, and to the estate limited by t habendum nothing is required to the perfection and essence there but only the delivery of the deed, there, although the habendum of a lesser estate than is mentioned in the premises, the habendu shall stand, as in the case at the Bar : to the fee simple limited the premises, it is requisite to have livery and seisin; and t delivery be made, nothing shall pass but an estate at will (if t deed had not gone farther), and therefore the habendum for yea is good presently by the delivery of the deed, and so it appeare it was the intent of the parties that it should take effect, by t delivery of the deed, for years" : *ibid.*, 2 Rep. 23 a; *S. C. s nom. Baldwyn* v. *Marton*, 1 Anders. 223, ca. ccxlii.

The necessity for attornment was abolished by 4 & 5 An (1705), c. 16, s. 9 (replaced by section 151 of the Law of Proper Act, 1925), and that for livery by 8 & 9 Vict. (1845), c. 106, s. (see now section 51 of the Law of Property Act, 1925), a consequently the case, if it now arose, would be decided accordi to the third, and not according to the fourth *dictum*.

For the new law as affecting limitations in deeds, see t following chapter.

CHAPTER XVI.

LIMITATIONS TO HEIRS AND HEIRS OF THE BODY.

rant in Fee Simple: "Heirs," or, since 1881, "Fee Simple" necessary [not after 1925]: Exceptions, The King; Corporations; Releases; Vesting Declarations; Reference: Qualified Fees: Determinable Fees: Conditional Fees: Estates Tail: "Heirs," or, since 1881, "Tail" necessary: "Of the Body" Implied, or Supplied by Context: Fee Simple cut down to Fee Tail by gift over: Estates in Special Tail or Tail Male or Female: Begotten includes to be begotten: "Heirs" or "Heirs of Body" extended by parenthesis to all Children: Fees cannot be made Inalienable: Grant to "Heirs" of Deceased Person: "Heirs" is Heir at Law: To "Heirs Male" of Deceased Person: Grant in Remainder to "Heirs" of Living Person: To "Heirs" of Grantor: Grant to "Heirs of Body" of Deceased Person: To "Heirs Male of Body" of Deceased Person: Grant in Remainder to "Heirs of Body" of Living Person: Rule in Shelley's Case [Rule abolished by Law of Property Act, 1925]: "Heirs" necessary: Estate in Ancestor by Implication: Both Limitations must be in same Instrument: One Limitation Legal, other Equitable: "Heirs of Body" meaning Children: Limitation to A for Life, Remainder to "Heir" or "Heir of his Body": Equitable Limitations in Executed Trusts construed in same manner as Legal Limitations: Personalty given to "A and his Heirs," or "Heirs of A," or "Heirs" in substitution for A, or "A and the Heirs of his Body," or "Heirs of Body of A."

It now becomes necessary to consider the effect of the ordinary nitations contained in deeds, and as the most important limitation that to a man and his heirs, it is proposed to consider that st. The estate conferred by a limitation to A and his heirs ffers according to the estate which the grantor has.

Grant to "A and his heirs" by owner in fee simple;

A grant by the owner of an estate in fee simple of lands, tenements, or hereditaments "to A and his heirs," or "to A, his heirs and assigns," or "to A, and the heirs of A," or "to A, and the

heirs and assigns of A," vests the fee simple in A as a purchaser.

New Law. In the case of conveyances or deeds executed after 1925 freeho land can be conveyed without words of limitation or any equivale expression. The grantee takes the fee simple or other th whole interest which the grantor had power to convey, subject t a contrary intention appearing in the conveyance: section 6 sub-section 1 of the Law of Property Act, 1925.

by owner in fee tail;

A grant by the owner of an estate in fee tail o lands, tenements, or hereditaments "to A and h heirs," not perfected by enrolment, vests a bas fee (*a*) in A, which base fee is liable to be deter mined after the death of the grantor by the entr of the person entitled on his death: Challis, R. P (3rd ed.), pp. 322, 330; *Calley* v. *Calley*, 2 Edw. iii. 3; 28 B. 14; Bro. Abr. Dow. 50; Ca. o Fines 3 Rep., at 84 b; *E. Seymor's Case*, 10 Rep 95 b; 1 Bulst. 162; *Walsingham's Case*, Plow. 54 arg.; Litt. 613; see Butler's note Co. Litt. 331 Prest. Abs. 363; *Machill* v. *Clark*, Holt, 615 1 Com. 119; 2 Salk. 619; 7 Mod. 18, 11 Mod. 19 2 Ld. Raymd. 778; *Goodright* v. *Mead*, 3 Burr 1703; *Doe* v. *Rivers*, 7 T. R. 276; *Doe* v *Whichelo*, 8 T. R. 211; *Doe* v. *Woodroffe*, 1 M. & W. 608; 15 M. & W. 769; 2 H. L. C. 811 15 L. J. Ex. 356; 81 R. R. 401; *Sheffield* v *Ratcliffe*, Godb. 301; *Hankey* v. *Martin* (1883) 49 L. T. 563; *Sturgis* v. *Morse* (1860), 2 D. F. & J. 223, at pp. 231, 232.

New Law. Section 133 of the Law of Property Act, 1925, abolishes th necessity of enrolment of disentailing assurances, etc., and a estate tail can only be created as an equitable interest under tha Act, s. 1, sub-s. 3. Consequently a grant made after 1925 by a owner of what, prior to 1926, would have answered the descriptio of a "fee tail," to "A and his heirs" would give A an entaile interest in the subject of the grant.

(*a*) "Base fee" here must not be taken as equivalent to that expression the Fines and Recoveries Act. It is rather in the nature of a determinable fe

A grant by the owner of a life estate of lands, tenements, or hereditaments "to A and his heirs" vests an estate *pur autre vie* in A, and A's heir, on A's death during the life without having disposed of his estate, is special occupant, but is chargeable with A's debts: Challis, R. P. (3rd ed.), 356 *et seq.* by owner for life;

New Law. A life estate can only exist as an equitable interest under the aw of Property Act, 1925. A grant by the owner of a life estate nade after 1925 in terms to "A and his heirs" would, it is submitted, give an equitable estate *pur autre vie* to A, and on A's eath during the life of the grantor without having disposed of is estate, this estate would devolve upon A's personal representatives and would be distributable according to the provisions f the Administration of Estates Act, 1925. Special occupancy is bolished by section 45 of this last-mentioned Act.

A lease for years or at will, or an assignment of a term of years, "to A and his heirs" vests the term in A; on his death during the term, the term vests in his legal personal representative and not in his heir, who has no interest whatever in the term: Litt. s. 740; Co. Litt. 388 a; Shep. Touch. 271, 469; 1 Prest. Est. 31; *Anon.* (1586), Godb. 42, pl. 48. The word "heirs" is in fact rejected as repugnant. by owner of term or by way of lease.

New Law. This proposition would appear to be unaffected by the new roperty legislation. Descent to the heir is abolished as regards person dying intestate after 1925: Administration of Estates ct, 1925, s. 45.

"If a man . . . will let . . . lands or tenements to another to ave and to hold to him and to his heirs at the will of the lessor, ese words (to the heirs of the lessee) are void": Litt. s. 82.

If A is a corporation sole, and a lease is made or assigned to m and his "successors," the word "successors" is rejected, yet his executors or administrators shall have it in *autre droit*": . Litt. 46 b. Terms limited to corporations sole.

New Law. There was formerly no way by which a term could be vested in a rporation sole, so as to shift at law to his successors. But by ction 180, sub-section 1 of the Law of Property Act, 1925, where either after or before the commencement of this Act any roperty or any interest therein is or has been vested in a corporaon sole (including the Crown), the same shall, unless and until herwise disposed of by the corporation, pass and devolve to and

New Law.

vest in and be deemed always to have passed and devolved to c vested in the successors from time to time of such corporation. See also section 3, sub-section 5 of the Administration of Estate Act, 1925.

"Heirs."

In deeds prior to 1882 no estate in fee simple could be create without the word "heirs," and in deeds since 1881 no estate in fe simple could be created without the word "heirs," or, under th Conveyancing Act, 1881, s. 51, the words "in fee simple." Bu after 1925 words of limitation are unnecessary. In the case c a deed executed after 1881 and before 1926, the words "in fe simple" are sufficient without the word "heirs": section 6(sub-section 4 of the Law of Property Act, 1925.

Where in a voluntary deed containing a clear declaration c trust of real estate, and professing to operate by appointment t trustees in exercise of a power, the limitation and conveyance wer to the trustees, "their executors, administrators and assigns, omitting the word "heirs," the Court held that the real estat was impressed with the trust and declared the heir-at-law of th settlor a trustee for the *cestui que trust*: *Dilbrow* v. *Bone* (1862 3 Gif. 538; 31 L. J. Ch. 417; 133 R. R. 174.

"If a man" before 1882 "would purchase lands or tenemen in fee simple, it behoveth him to have these words in his purchas 'to have and to hold to him and to his heirs': for these word 'his heirs' make the estate of inheritance. For if a man purcha lands by these words, 'to have and to hold to him for ever'; or b these words, 'to have and to hold to him and his assigns for ever in these two cases he hath but an estate for term of life, for tha there lack these words, 'his heirs,' which words only make a estate of inheritance in all feoffments and grants": Litt. s. 1.

"A in fee simple."

"If one grant," before 1882, "to J. S., to have and to hold him in fee simple, or in fee tail, without saying 'to him and h heirs,' or, 'to him and his heirs males,' or the like, this is but a estate for life and no more. . . . So if one [by deed or fine] gra land to J. S., to have and to hold to him and his seed, or to hi and his issue generally without more words, by this [grant] made only an estate for life": Shep. Touch. 106.

"A and his seed or issue."

Bastard.

The rule applies in the case of a bastard, all of whose heirs mu be his issue: Co. Litt. 3 b; *per* Holt, C.J., *Idle* v. *Cook* (1705 1 P. Wms. 70, at p. 78; 2 Ld. Raym. 1144, at p. 1152; 11 Mod. 5 at p. 58.

"Issue, seed, children, offspring."

"As if the grant be to a man and his *issue of his body*, to a ma and his *seed*, to a man and his *children* or *offspring*; all these a only estates for life, there wanting the words of inheritance, h heirs": 2 Blackst. Com. 115.

"For ever."

"The word, 'heirs,' is necessary in the grant or donation

rder to make a fee, or inheritance. For if land be given to a man or ever, or to him and his assigns for ever, this vests in him but an state for life " : 2 Blackst. Com. 107.

A grant to a natural person and his successors gives only an state for life : Shep. Touch. 106. "Successors."

" And it is to be observed that every word of Littleton is worthy f observation. First (heires) in the plural number, for if a man ive land to a man and to his heir in the singular number he hath ut an estate for life, for his heir cannot take a fee simple by escent because he is but one, and therefore in that case his heir hall take nothing " : Co. Litt. 8 b; *Waker* v. *Snowe* (1620), Palm. 59; *Chambers* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. Ch. 193; 5 R. R. 94. Mr. Hargrave in his note to the passage in Coke ays : " According to many authorities, ' heir ' may be *nomen ollectivum* as well in a deed as a will, and operate in both in the ame manner as ' heirs ' in the plural number." But the cases that e cites are all cases of wills, with the possible exception of the case n Godbolt, as to which it does not appear whether it refers to a will r a deed, and where there is only a *dictum*, and of the passage in *larke and Daye's Case* (1595), 1 Roll. Abr. 832, K. 1; 10 Vin. br. 234, K. 1, which appears to be a *dictum* in a case on a will s to the effect of a deed : the *dictum*, moreover, is not found in ne reports of the case in Cro. Eliz. 313, and Moore, 593. "Heir" insufficient.

Where by her marriage settlement a settlor conveyed certain nds to trustees to hold in trust for her during her life for her eparate use, and after her death in trust for such person or ersons and in such manner as she should by will appoint, and n default of and until such appointment and so far as no such ppointment should extend, " in trust for the heir-at-law " of the ttlor. *Held* (*inter alia*), that under the limitations of the settlement the settlor took an estate for life, the person who at her eath answered the description of her heir-at-law took an estate r life, and there was a resulting trust in favour of the settlor : *e Davison's Settlement*, [1913] 2 Ch. 498; 83 L. J. Ch. 148, here Mr. Hargrave's note (*supra*) is discussed.

But " heir or heirs " *probably* give a fee : *Bony* v. *Taylor* (1614), Roll. Abr. 253; 16 Vin. 213, Parols, H., pl. 3, in which case, owever, there were further words of limitation. The case is ated, *infra*, p. 361. "Heir or heirs."

If a man give land unto two, to have and to hold to them two *haeredibus*, omitting *suis*, they have but an estate for life, for the ncertainty : Y. B. 22 Hen. 6 (1443), 15, pl. 28. " But it is said land be given to one man, *et haeredibus*, omitting *suis*, that twithstanding the fee simple passeth " : Co. Litt. 8 b; see also "His" omitted.

Y. B. 19 Hen. 6 (1440), 73, pl. 2; *Colthirst* v. *Bejushin* (1550) Plow. 21, at p. 28; Shep. Touch. 101.

"A or his heirs."

An immediate limitation to "A *or* his heirs" gives an estat for life only to A: Co. Litt. 8 b, 214 a; *Mallory's Case* (1601) 5 Rep. 111 b, at p. 112 a; but such limitation in remainder is it is submitted, an alternative limitation, *viz.*, a vested remainde to A for life, and a contingent remainder in fee simple to the hei of A, which becomes vested if A dies before the prior estat determines.

Word "heirs" rejected.

The context may show that the word "heirs" is to be rejected Thus it is rejected in limitations of chattel interests; *supra*, p. 327

By a marriage settlement freeholds were vested in trustees "t hold to the use of A, his heirs and assigns, from the perfection o these presents for and during the term of his natural life"; the followed a limitation to trustees to preserve, etc., and other usua provisions in a strict settlement. *Held*, that A took an estate fo life only: *Re Hammersly* (1861), 11 Ir. C. R. 229; affirmed o another point, 12 Ir. C. R. 319.

"Fee simple" necessary, "fee" insufficient.

If reliance be placed on section 51 of the Conveyancing Act 1881, it is necessary in order to pass the legal estate in fee simpl by deed, in the absence of the word "heirs," to use the actua words of limitation mentioned in that section, namely, "in fe simple": a conveyance "in fee" omitting the word "simple" does not pass the legal estate in fee simple: *Re Ethell and Mitchel and Butler's Contract*, [1901] 1 Ch. 945; 70 L. J. Ch. 498; an an equitable limitation by way of trust executed has the sam construction as a legal limitation whether or not the documen discloses any contrary intention: *Re Bostock's Settlement, Norris* v. *Bostock*, [1921] 2 Ch. 469; 91 L. J. Ch. 17. See also *Re For and Ferguson's Contract*, [1906] 1 Ir. R. Ch. 607. But circum stances may arise where, from a consideration of the terms of deed the words "in fee" in the habendum are capable of being an should be construed as "in fee simple," and the deed is effectua under section 51 of the Conveyancing Act, 1881, to pass an estat in fee simple accordingly: *Re Ottley's Estate*, [1910] 1 Ir. R Ch. 1.

The absence of the word "heirs" in the habendum compensate for by its inclusion in the premises: *Fayle and Irish Feather Co.' Contract*, [1918] 1 Ir. R. Ch. 13.

New Law. But as to deeds executed after 1925, see p. 328 (*supra*).

"Assigns."

The word "assigns" in the expression "heirs and assigns" ha no operative value and is mere surplusage, it cannot be construed a giving a power of appointment: *Brookman* v. *Smith* (1871), L. R. Ex. 291, at p. 306; 40 L. J. Ex. 161; *Milman* v. *Lane*, [1901 2 K. B. 745; 70 L. J. K. B. 731 (both cases on wills); *Re Wokin*

J. D. C., etc., Act, 1911, [1914] 1 Ch. 300, at pp. 307, 317; 3 L. J. Ch. 201.

There are exceptions to the rule that the word "heirs" is necessary. Exceptions.

First. The King may take a fee simple by deed enrolled without the word "heirs" or "successors": Co. Litt. 9 b; Shep. Touch. 101; 2 Blackst. Com. 109; in such case he takes as a body politic. He may also take "to him and his heirs," in such case he takes in his capacity as a man; or he may take "to him and his heirs Kings of England," or "to him and his successors Kings of England," in which cases he takes in his capacity as a body politic; in every case he takes a fee simple: *Willon* v. *Berkley* (1562), Plow. 223, at p. 234. The King.

Second. "If a man had given land to a man with his daughter in frank-marriage generally, a fee simple had passed without these words (his heirs)": 10 Vin. Abr. Estate, K. 2, pl. 5, p. 235, citing Co. Litt. 9 b, 10 a; see also Shep. Touch. 103; but frank-marriage is stated to be equivalent to a grant in special tail in Litt. ss. 17, 19 and 20; Co. Litt. 9 b; and frank-marriage is distinguished from fee simple in *Blaunket* v. *Simonson*, Y. B. 2 Edw. 2 (1308), 29 (wrongly numbered 26); 17 Selden Society Publications, p. 126; Y. B. 45 Edw. 3 (1371), 19, 20, pl. 22. Frank-marriage.

Third. A gift to a corporation sole in frankalmoigne passed the fee without any words of limitation: Co. Litt. 9 b, 34 b; 1 Roll. Abr. 833, L. 5 and 6; Shep. Touch. 101; 2 Blackst. Com. 109. Frank-almoigne.

Fourth. "In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word 'heirs,' for they are implied in the creation, unless it be otherwise specially provided: but in creations by patent which are *stricti juris*, the word 'heirs' must be inserted, otherwise there is no inheritance": 2 Blackst. Com. 108. Peerages by writ.

Fifth. A gift to all a corporation aggregate, where all the corporation can take, passes the fee without any words of limitation: Y. B. 11 Hen. 4 (1410), 84, pl. 34; Y. B. 39 Hen. 6 (1460), 3, pl. 17; Y. B. 11 Hen. 7 (1495), 12, pl. 36; and Y. B. 27 Hen. 8 (1536), 15, pl. 6; Co. Litt. 9 b, 94 b; 2 Blackst. Com. 109; but if only one of the corporation can take, the word "successors" appears to be necessary: Co. Litt. 94 b; 1 Roll. Abr. 832. Corporation aggregate.

In a conveyance of freehold land executed after 1925, and made to a corporation sole by his corporate designation, the word "successors" is unnecessary—section 60, sub-section 2, Law of Property Act, 1925. **New Law.**

As to the effect of a grant made while there is no capable member of a corporation aggregate, or while a corporation sole is Corporation vacant.

vacant : see *Holden* v. *Smallbrooke* (1668), Vaugh. 187, at p. 199 Litt. s. 443; Co. Litt. 264 a.

A lease for years vested in a corporation determines upon th dissolution of the corporation without having assigned the ter and the lessor's reversion is accelerated : *Hastings Corporation* v *Letton*, [1908] 1 K. B. 378; 77 L. J. K. B. 149; *Re Albe Road*, [1916] 1 Ch. 289; 85 L. J. Ch. 187. See also *Re Wokin U. D. C., etc., Act*, 1911 (*supra*).

New Law.

The effect of section 180, sub-section 2, Law of Property Act 1925, is to validate grants to corporations notwithstanding that a the time of the grant there was a vacancy in the corporation. Bu such grant is liable to be disclaimed.

Releases.

Sixth. The rule does not apply to certain releases : "First when an estate of inheritance passeth and continueth, as if there b three coparceners or joint tenants, and one of them releases to th other two, or to one of them, generally, without this word 'heirs' . . . secondly, when an estate of inheritance passeth and con tinueth not, but is extinguished, as when the lord releaseth to th tenant, or the grantee of a rent, &c., release to the tenant of th land generally all his right, &c., hereby the seignory, rent, &c., ar extinguished for ever, without these words 'heirs'; thirdly, whe a bare right is released, as when the disseisee release to the disseiso all his right he need not . . . speak of his heirs" : Co. Litt. 9 b See *ibid.*, 193 a; Shep. Touch. 327; *Estoft's Case* (1567), Dye 263, at pl. 34; 1 And. 45, ca. cxiv; Bendl. 32, pl. 129; Benl. & Dal. 195, pl. 232.

Grants of rents on partition.

Seventh. "If partition be made between coparceners of land in fee simple, and for owelty of partition one grant a rent to th other generally, the grantee shall have a fee simple without thi word 'heirs'" : Co. Litt. 10 a; *Browning* v. *Beston* (1555), Plowd 131, at p. 134.

Fine and recovery.

Eighth. An estate in fee simple could be treated by a fine *su conusans de droit, come ceo*, etc., or by a recovery without th word "heirs" : Co. Litt. 9 b; 5 Cru. Dig. tit. xxxv, c. 3, s. 13 p. 95; or by a fine *sur cognizance de droit tantum* : 5 Cru. Dig tit. xxxv, c. 3, s. 19, p. 96.

Bargain and sale, before Statute of Uses.

Ninth. An estate in fee simple could be created by a bargai and sale without the word "heirs" before the Statute of Uses 27 Hen. 8 (1535), c. 10 : Y. B. 27 Hen. 8 (1536), 5, pl. 15, and 7 pl. 21, at p. 8; 10 Vin. Abr. tit. Estate, K. 2, pl. 1, 2, pp. 234 235; *Corbet's Case* (1600), 1 Rep. 83 b, at p. 87 b; *Shelley's Cas* (1581), 1 Rep. 93 b, at p. 100 b. Probably the reason of this wa that prior to the Statute of Uses the estate of the *cestui que us* was only an equitable interest.

Vesting declarations.

Tenth. Declarations vesting property in trustees under th

Conveyancing Act, 1881, s. 34, or the Trustee Act, 1893, s. 12 (now replaced by section 40 of the Trustee Act, 1925).

Eleventh. A fee may be limited by words of reference: Co. Litt. 9 b; *Garde* v. *Garde* (1843), 3 Dr. & War. 435; 2 Con. & L. 75. Reference.

Thus a fee simple can be limited by deed by reference to words contained in a will, though the word "heirs" is not used in the will, if the words in the will are sufficient to create a fee simple: *ex. gr.* conveyance by deed to the uses of a will.

Leaseholds were settled upon trusts under which two persons became absolutely entitled to a share as tenants in common; freeholds were subsequently settled upon the same trusts "as near as the difference of the estates of the trustees and their heirs would admit, to the intent that the rents might be taken and the hereditaments held, sold, conveyed, and assigned, and the produce thereof paid and applied unto such person and persons and in such manner in every respect as was in the settlement of leaseholds expressed and declared of the property therein described." It was held that the two persons were entitled to an equitable fee simple in the freeholds: *Pugh* v. *Drew* (1869), 17 W. R. 988; *Brigg* v. *Brigg* (1885), 33 W. R. 454; 54 L. J. Ch. 464.

Twelfth. By special custom a surrenderee of copyholds could take a fee-simple without the word "heirs": *Thettenwell* v. *Bunney* (1563), and *Browne* v. *Foster* (1584), both cited in *Warne* v. *Sawyer* (1614), 1 Roll. Rep. 48; *Bunting* v. *Lepingwell* (1585), 4 Rep. 29 a, at p. 29 b; 2 Prest. Est. 67; Challis R. P. (3rd ed.), p. 222, n. Copyholds.

Thirteenth. In a grant to a corporation sole the word "heirs" is not necessary, the word "successors" being substituted for it: Co. Litt. 8 b; Shep. Touch. 101; 2 Black. Com. 108; and unless the word "successors" is used a life estate only passes, even if the grant be to the corporation and his heirs, or to the corporation in fee simple: Y. B. 9 Hen. 5 (1421), 8, pl. 2; Co. Litt. 8 b, 94 b, n. (4); 1 Roll. Abr. 832. But as to the word "successors," see p. 331 (*supra*). Corporation sole. "Successors" necessary.

In old times grants were made "to God and the church of ——," and neither the word "successors" nor "heirs" was used: Bracton, 286 b; preamble to Act 23 Hen. 8 (1531), c. 10; Queen Anne's Bounty Act, 1 Geo. 1 (1714), c. 10 (in some editions c. 11), s. 21. When the more modern form was introduced there was a good deal of doubt what was the effect of the grant: see Y. B. 11 Hen. 4 (1410), 84 b, pl. 34; Y. B. 12 Hen. 8 (1520), 8 a; Co. Litt. 94 b; Shep. Touch. 101; 1 Roll. Abr. 833, L. 4; but it is clear the parson has only a qualified fee: Co. Litt. 300 b, 341 b; *Marlborough* v. *St. John's* (1852), 5 De G. & S. 174; *Bartlett* v.

Phillips (1859), 4 De G. & J. 414; *Ross* v. *Adcock* (1868), L. R. 3 C. P. 655, at p. 664; 37 L. J. C. P. 290; *Sowerby* v. *Fryer* (1869), L. R. 8 Eq. 417; 38 L. J. Ch. 617; *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552; 64 L. J. Ch. 329; and in old days he could have no proprietary writ except *juris utrum*, as to which see the article by Professor Maitland on "Frankalmoign in the Twelfth and Thirteenth Centuries," in the Law Quarterly Review (1891), vol. vii, 354, at p. 360.

In "fee simple" insufficient since 1882, and prior to 1926.

A grant to a corporation sole "in fee simple," since 1882 and prior to 1926, would probably not have vested the legal fee in the corporation sole. The words "in fee simple" seem to be substituted by section 51 of the Conveyancing Act, 1881, for the word "heirs," and not also for the word "successors," which is not mentioned in the section. Challis (R. P., 3rd ed., p. 224) leaves the point doubtful. See now section 60, sub-section 2 of the Law of Property Act, 1925.

New Law.

Other exceptions.

For other exceptions see 10 Vin. Abr. tit. Estate, K. 2, pl. 3 and 8, and L. pl. 4, pp. 235, 236 and 238.

Limitation to A and his heirs subject to a qualification.

A limitation to A and his heirs subject to some qualification, of a kind permitted by law, gives rise to a qualified fee.

Three qualifications allowed.

Such lawful qualification may be of three kinds—(i) the class of heirs to take may be restricted; (ii) the estate instead of enduring for ever may be liable to be cut short on the happening of a future event; such a limitation gives rise to a determinable fee; or (iii) the heirs to take may be restricted to the heirs of the body of a specified person or persons; such a limitation gives rise to a conditional fee at common law and a fee tail under the statute *De Donis Conditionalibus*, 13 Edw. 1 (1284), c. 1.

First qualification.

Limitation to A and heirs of B his ancestor.

The only example of the first class which is given in the books is a grant to A and the heirs of B, where B is the ancestor in the paternal line of A; which, it will be noticed, is not in form a grant to A and his heirs.

The question as to the nature of the estate conferred by such a limitation, the validity of which is noticed in Littleton, s. 354; Co. Litt. 220 b, is discussed at great length in Challis, R. P. (3rd ed.), c. 19, pp. 269 *et seq*. It seems that B must be a paternal ancestor of A.

A grant of this kind is hardly likely to arise nowadays, but if it did it might be a question whether A, although taking what has been described as a qualified fee, in effect acquired a fee simple absolute (which is a legal estate under the new property legislation). Challis seems to think that this might be so.

No other qualification of the heirs general is good, for it is a ear rule that—

> If there be added to a limitation to "A and his heirs" any qualification such as "lawfully issuing" (without stating from whom they are to issue), or "male," such qualification is void and does not cut down A's estate from a fee simple.

In limitations to A and his heirs, no qualification of heirs allowed.

"If a man giveth lands to a man to have and to hold to him nd his heires on the part of his mother, yet the heires on the part the father shall inherit, for no man can institute a new kind inheritance not allowed by the law, and the words (of the part his mother) are voide": Co. Litt. 13 a.

Heirs on the part of his mother.

"If a man give lands or tenements to another, to have and to old to him and to his heirs males, or to his heirs females, he to hom such a gift is made hath a fee simple, because it is not mited by the gift of what body the issue male or female shall e": Litt. s. 31; Co. Litt. 13 a.

Heirs male or female.

"A man seised of land in gavelkind gives or devises the same a man and to his eldest heires. He cannot hereby alter the ustomary inheritance, but the law rejecteth this adjective ldest)": Co. Litt. 27 a. [The Administration of Estates Act, 925, has abolished gavelkind in the case of a person dying after 925.]

Eldest heirs.

"If lands be given to the son and to *his* heirs of the body of s father, the son cannot take as heir of the body of his father, ecause the grant is to him and to his heirs, etc., and consequently hath a fee simple": Co. Litt. 27 a; the words "of the body of s father" being rejected as repugnant.

A and his heirs of the body of his father.

"Right heirs males": *Doe* v. *Martyn* (1828), 8 B. & C. 497; Man. & Ry. 485; 7 L. J. (o.s.) K. B. 60; 32 R. R. 459; "heirs ales lawfully engendered": *Abraham* v. *Twigg* (1595), Cro. iz. 478; Moore, 424; confer a fee simple.

"Right heirs males." "Heirs males lawfully engendered."

But the context may show that such words are to be read as the body: see *Beresford's Case* (1607), 7 Rep. 41 a, and cases llected *infra*, pp. 340, 341.

"Of his body" by context.

A grant by the Crown to A and his heirs male is absolutely id: *Lord Lovel's Case*, 18 Hen. 8 (1526); Br. tit. Patents, pl. 4, cited in the *Case of Alton Woods* (1600), 1 Rep. 40 b, at . 43 b, 46 a; "for that the King is deceived in his grant, asmuch as there can be no such inheritance of lands or tenements the King intended to grant": Co. Litt. 27 a.

Grant by the Crown.

In *The Earl of Devon's Case* (1831), 2 Dow & C. 200; 5 Bli. .s.) 220, it was held by the House of Lords that a limitation of

Peerage cases

a peerage to a man and his heirs male for ever is good, and tha the dignity descends in the course so marked out on the groun that a grant of honours is not regulated by the same law as grant of land. But in the *Wiltes' Peerage Case* (1869), L. R. H. L. 126, it was held, first, that the decision of the House c Lords in a peerage case was not binding on the House in subsequen cases, for it was not a judicial decision in the sense in which th decision of the House on an appeal from a Court of law or equit is a judicial decision; and, secondly, that a limitation of a peerag to a man and his heirs male for ever was invalid except for th life of the grantee. And it was held, both in that case and in th *Buckhurst Peerage Case* (1876), 2 Ap. Ca. 1, that the Crown coul not limit the descent of a peerage in a manner different from tha in which real estate can be made to descend according to the la of the country. In the latter case it was also held that there coul be no use or trust in a peerage, and therefore a limitation in patent adapted from a shifting use of real estate was invalid. Ther are some observations on the point by Bacon, V.-C., and Mellish L.J., in *Cope* v. *Earl de la Warr* (1873), L. R. 8 Ch. 982, a pp. 986, n. and 995; 42 L. J. Ch. 870.

In Scots law, however, it appears that limitations of lan and honours to a man and his heirs male are valid: *pe* Chelmsford, L.C., *Wiltes' Peerage Case* (1869), L. R. 4 H. L. 126 at p. 155.

Armorial bearings.

In Co. Litt. 27 a will be found some remarks on a grant c armorial bearings to a man and his heirs male.

Second qualification.

Determinable fee.

In the second class of cases the limitation is made by limitin the estate until the happening of a future event, which *must* b such that it may never happen at all, as, *e.g.*, to A and his heir so long as B has heirs of his body: *Edward Seymor's Case* (1611) 10 Rep. 95 b at 97 b. If the event must happen sooner or late no fee is passed, but the grantee takes either a tenancy at wi or a term of years or a life estate.

Estate *pur autre vie*.

Thus the effect of a limitation to A and his heirs during th life of B, since B must die, though the date of his death i uncertain, is that A takes not a determinable fee, but an estat *pur autre vie*, and if A dies without having disposed of his estat *pur autre vie*, his heir takes it as special occupant, and not b descent: *Atkinson* v. *Baker* (1791), 4 T. R. 229; 2 R. R. 366 *Doe* v. *Luxton* (1795), 6 T. R. 289; see *infra*, pp. 389, 390 [Special occupancy has been abolished as to deaths after 1925 b the Administration of Estates Act, 1925, s. 45.]

Determinable fee at common law.

The question whether a fee can be made determinable a common law is discussed in Sanders on Uses, 208, and in Gray o Perpetuities, pp. 18 *et seq.*, where the cases are collected.

The many questions that occur on determinable fees will e found discussed in Co. Litt. 201 a to 237, "Estates upon ndition." As to the meaning of "condition," see 2 Fearne, R. (10th ed.) 3. The cases on the construction of fees made terminable by shifting clauses taking effect under the Statute Uses are discussed in Co. Litt. 327 a, note; 3 Dav. Prec. 349 *seq.*

In Challis, R. P. (3rd ed.), pp. 255 *et seq.*, will be found a ıg list of determinable fees. The determinable fee which is ɔst usually met with is the ordinary limitation in a marriage ttlement of realty which limits the lands settled to the use of e grantor and his heirs until the intended marriage shall be emnised.

In the third class of cases the heirs are restricted to heirs of e body of a particular person or persons.

Third qualification.

Heirs of the body.

A limitation to A and the heirs of his body of hereditaments, which are not tenements, vests in A a conditional fee.

Conditional fee in hereditaments not tenements.

Such conditional fee is for practical purposes enlarged to a fee ıple on the birth of issue of his body : Co. Litt. 20 a, *Nevil's Case* 604), 7 Rep. 33 a, at p. 34 b; *Stafford* v. *Buckley* (1750), 2 Ves. ı. 170. The exact nature of the estate is discussed Co. Litt. a, Challis, R. P. (3rd ed.), c. 18, pp. 263 *et seq.*

The learning on the subject is not now of much importance.

New Law.

Determinable and conditional fees can only exist now as equit- e interests, see Law of Property Act, 1925, First Schedule, t I.

By section 7, sub-section 2 of that Act a fee simple vested in corporation which is liable to determine by reason of the dis- ıtion of the corporation is, for the purposes of that Act, a fee ple absolute.

A person of full age, whose estate or interest is in possession who is entitled to a base or determinable fee, although the ersion or right of reverter is in the Crown, has the powers of enant for life under the Settled Land Act, 1925, s. 20, sub-s. 1 . See also section 117, sub-section 1 (iv) of that Act.

Words which create an estate tail in freeholds, create a conditional fee in copyholds holden of a manor where there is no custom to entail.

Conditional fee in copyholds.

The authorities in support of this proposition are *Rowden* v. *tster* (1626), Cro. Car. 42; *S. C. sub nom. Royden and ılster's Case*, Godb. 367; *Pullen* v. *Middleton* (1754), 9 Mod.

483 (where the limitations were equitable, which it was held ma no difference); *Doe* v. *Clark* (1822), 5 B. & Ald. 458; 24 R. 457; and *Doe* v. *Simpson* (1838), 4 Bing. N. C. 333; *S. C.* Exch. Ch. *sub nom. Doe* v. *Simpson* (1842), 3 Man. & Gr. 92 60 R. R. 634. The last two are cases on wills.

In view of the abolition of copyhold tenure by the Law Property Act, 1922, this section is of little practical importance.

Estates tail.

With regard to hereditaments which are tenements, the limit tion gives rise to the ordinary estate tail, the rules with rega to the creation of which may be thus stated—

Grant to "A and the heirs of his body" by owner in fee simple;

A grant by the owner of an estate in fee simp of lands, tenements, or hereditaments, which a tenements, "to A and the heirs of his body" ves an estate tail in A as a purchaser.

New Law.

On January 1, 1926, all estates tail were by the combin operation of section 39 of the Law of Property Act, 1925, a Part I of the First Schedule to that Act converted into equital interests, and an interest in tail or in tail male or in tail fem or in tail special is by that Act called "an entailed interest."

By section 130 it is now possible to create an entailed inter in personalty. Hitherto "tenements" only have been entailab

by owner in fee tail;

A grant by the owner of an estate in fee t of lands, tenements, or hereditaments, which a tenements, "to A and the heirs of his body," n perfected by enrolment, vests an estate tail in but of the nature of a base fee tail which is liab to be determined after the death of the grantor the entry of the person entitled on his deat Challis, R. P. (3rd ed.), pp. 322, 330.

New Law.

A grant of this nature if made after 1925 would confer entailed interest on A. As to the expression "base fee" and abolition of enrolment, see p. 326 (*supra*).

by owner for life;

A grant by the owner of a life estate of lan tenements, or hereditaments, which are tenemen "to A and the heirs of his body" vests an est *pur autre vie* in A, and the heir of the body of on A's death during the life without having d posed of his estate, is special occupant, but

chargeable with A's debts : Challis, R. P. (3rd ed.), p. 358.

By virtue of the Law of Property Act, 1925, a life estate can y exist as an equitable interest. Consequently a grant by the ner of a life estate as above to "A and the heirs of his body" uld, it appears, confer an equitable estate *pur autre vie* on A, l on the death of A during the life of the *cestui que vie*, without ving disposed of the estate, it would devolve upon the person o prior to 1926 would have answered the description of the ieir of the body" of A as governed by the general law in force 1925 applicable to freehold land. New Law.

A lease for years or at will, or an assignment of a term of years, "to A and the heirs of his body" vests the term in A, and on his death during the term the term vests in his legal personal representative, and not in the heir of his body, who has no interest whatever in the term: Litt. s. 740; Co. Litt. 388 a. The words "heirs of the body" are in fact rejected as repugnant. by owner of term, or by way of lease.

Leaseholds may now be entailed; consequently a lease for years an assignment of a term of years to "A and the heirs of his ly" will, it is submitted, confer an entailed interest upon A, l on his death during the continuance of the term without having entailed or disposed of this interest by will, it will devolve upon person who prior to 1926 would have answered the description "the heir of the body" of A as governed by the general law force in 1925 applicable to freehold land. New Law.

In deeds prior to 1882 no estate tail could be created without the rd "heirs"; and in deeds since 1881 no estate tail could be ated without the word "heirs," or, under the Conveyancing Act, 1, s. 51, the words "in tail." The word "heir" was prob- y sufficient. The words "of the body" might be supplied by lication or the context.

It is sufficient, in the case of a deed executed after 1881 and ore 1926, in the limitation of an estate tail to use the words "in " without the words "heirs of the body," and in the limitation n estate in tail male or in tail female, to use the words "in tail e" or "in tail female," as the case requires, without the words eirs male of the body" or "heirs female of the body": sec- 60 of the Law of Property Act, 1925. New Law.

'In gifts in tail these words (heirs) are as necessary as in feoff- ts and grants; for seeing every estate tail was a fee simple at "Heirs" necessary.

the common law, and at the common law no fee simple could be feoffments and grants without these words 'heirs,' and that estate in fee tail is but a cut or restrained fee, it followeth that gifts in a man's lifetime no estate" (*sc.* estate tail) "can be creat without these words 'heirs,' unless it be in case of frank marriage Co. Litt. 20 a.

Issue male.

Thus, a limitation to "A and his issue male of his body," to ' and for want of issue of his body," remainder over, is not an est tail: *Nevil* v. *Nevil* (1617), 1 Brownl. & G. 152; *Seagood* v. *H* (1634), Cro. Car. 366; *Makepiece* v. *Fletcher* (1735), Com. R 457; *Wheeler* v. *Duke* (1832), 1 Cr. & Mee. 210; 3 Tyr. 61; *Daws* v. *Dawson* (1850), 13 Ir. L. R. 472. See *per* Kindersley, V.- *Phillips* v. *James* (1865), 2 Dr. & Sm. 404, at p. 411; 143 R. R. 2

"Heir" of body in the singular.

The only case of an estate tail being created by the word "hei of the body in the singular in a deed is the case 39 Ass. (1365), pl. (cited in Co. Litt. 22 a, and *per* Hale, C.J., *King* v. *Melling* (167 1 Ventr. 228, and *per* Fenner, J., *Lilly* v. *Taylor* (1590), Owen, 14 where lands were given to a man and his wife, and one heir of th bodies lawfully begotten, and to one heir of the body of that h only; and it was held to be tail: see *S. C.* Bro. Abr. "Estat pl. 38; *ibid.*, "Tail," pl. 23; Perkins, s. 171 (fo. 36, ed. 152 where "*tamen quaere*" is added to the citation; Fitzh. A "Tail," pl. 19. The point is discussed in 1 Co. Rep. by Fras p. 164, note (Y) (*Archer's Case*); in *Warrick* v. *Warrick* (174 3 Atk. 291; *Bayley* v. *Morris* (1799), 4 Ves. 788, and *Chambers* *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. Ch. 193; 45 R. R. 94; a in *White* v. *Collins* (1719), Com. Rep. 289, and *Dubber* v. *Trollo* (1764), Amb. 453 (which were both cases of devises).

"Heir *or* heirs of body."

But "heir or heirs of his body" is *probably* tail: *Bony* *Taylor* (1614), 2 Roll. Abr. 253, H. 3; 16 Vin. Abr. 213, "Parol H. 3, in which case, however, there were further words of limi tion; the case is stated *infra*, p. 361.

"Of the body" supplied by implication.

The words "of the body" may be supplied by implication the context.

"De corpore."

"These words are not so strictly required but that they m be expressed by words that amount to as much; for the exam that the statute of Westminster Second putteth hath not th words, '*de corpore*,' but these words '*heredibus*,' viz., *Cum aliq dat terram suam alicui viro et ejus uxori et heredibus de ipsis v et muliere procreatis.* If lands be given to B., *et heredibus q idem B. de prima uxore sua legitime procrearet*, this is a good est in especiall tail (albeit, he hath no wife at that time) without th words, '*de corpore*.' So it is if lands be given to a man and to heirs which he shall beget of his wife or to a man, *et heredibus*

ne sua, or to a man, *et heredibus de se*. In all these cases these good estates in tail, and yet these words, *de corpore*, are itted " : Co. Litt. 20 b. In *Beresford's Case* (1607), 7 Rep. 41 a here the words were " and the heirs male of the said A lawfully otten "); *Jack* v. *Fetherstone* (1829), 2 Huds. & Bro. 320 (to the t son of the body of A and the heirs male of such first son law-y issuing); *Idle* v. *Cook* (1705), 2 Ld. Raym. 1144, at pp. 1152, 3, *per* Holt, C.J.; and Viner, " Estate," T. 5 (his heirs if shall have heirs *de carne sua*); it was held that there was estate tail; but where the limitation was to Wm. Cotton *et mogenito filio suo et haeredi masculo et sic de primogenito ad mogenitum dicti* Wm., it was held that these words did not ate an estate tail either in William or his eldest son : *Cotton's e* (1590), 1 Leon. 211; *S. C., sub nom. Smy* v. *June*, Cro. Eliz. ; *sub nom. Smye* v. *Chown*, 1 Anders. 264; *sub nom. Anon.*, . 712.

" De carne." " De se."

" If lands be granted to J. S., to have and to hold to him and the rs he shall happen to have of his wife; by this gift he hath but estate tail, and no fee simple " : Shep. Touch 104.

Settlement to use of E for life, remainder to S in tail male, ainder to F in tail, remainder to E in fee, with power to E to oke the uses limited to S, and to limit new uses. By deed E oked the uses limited " to S and his heirs male," omitting " of body," and limited new uses " to S and his heirs male," itting " of his body." *Held*, that S took an estate tail, since, t were construed a fee simple, it would destroy the remainder ited to F, which E had not power to do : *Gilmore* v. *Harris* 85-93), 3 Lev. 213; Skin. 324; Carth. 292.

" Of the body " supplied by context.

If a gift be made to A and his heirs saving the reversion to the or, A has an estate tail only : 9 Edw. 3 (1335), cited, *per* verton, *Kene's Case* (1626), Litt. Rep. 4; 2 Fitzh. Abr. aile," pl. 21.

After 1925 it would appear that entailed interests must be created expressions which, prior to 1926, would have been effectual in a d (not being an executory instrument) to create an estate tail in hold land (section 130, sub-section 1, Law of Property Act, 5); consequently it seems to be correct to say that an entailed rest will not be able to be implied from the context, but to say such an interest cannot be implied at all in a deed seems to unt to too wide a proposition. For an entailed interest implied aw in the case of an infant, see section 51, sub-section 3 of the inistration of Estates Act, 1925.

New Law.

Some of the cases in which the words " of the body " are implied of sufficient importance to be stated as separate rules :—

Limitation over on death without issue.

A limitation to "A and his heirs" with limitation over on his death "without issue" gi A an estate tail.

The cases are collected *infra*, Chapter on Death without Iss

Limitation over on failure of heirs of A to a person who may be his heir.

A limitation to A and his heirs, with a limi tion over, on failure of the heirs of A, to B, w is capable of being the heir of A, gives A an est tail.

A settlor made a conveyance by way of marriage settlement trustees "in trust for the use of himself for life, then to use of his wife for life, and then in trust for the use of his first and the heirs of such first son, and from and immediately after determination of that estate, in trust for the use of his second, th fourth, fifth, and all and every other son and sons, and t several and respective heirs, and for default of such issue, then the use of all and every of his daughter and daughters, and t heirs, to take as tenants in common, and not as joint tenants, for want of such issue, then in trust for the use of the right h of the survivor of himself and his wife for ever." It was held t the sons took successively estates in tail, but that the daugh took estate in fee simple; Abbott, C.J., and Holroyd, J., gave reasons for holding that the sons took in tail; but Bayley, adopting the argument of counsel, says, "In the first limitatio this deed, the word 'heirs' is necessarily used in the restric meaning, on account of the subsequent limitation to the second s For the deed speaks of the determination of the estate of eldest son, which could not happen if by the word 'heirs' meant 'heirs general,' for there could be no failure of heirs gen to the eldest son whilst the second son remained alive. The s observation will apply to the limitation over to the second, th and other sons": *Doe* v. *Smeddle* (1818), 2 B. & Ald. 126; R. R. 377.

The limitations in a post-nuptial settlement were to A, husband, for life, remainder to trustees to preserve, remainde the use of B the eldest son of the marriage "and to the heirs of said B, and for default thereof," remainders to the other son A successively in tail male. *Held*, tail in B: *Wall* v. *Wright* (18 1 Dr. & Wal. 1 (Lord Plunket in his judgment approves of *Do Smeddle*, 56 R. R. 147). See also *Jack* v. *Fetherstone* (18 2 Huds. & Bro. 320; *Shelley* v. *Earsfield* (1662), 1 Rep. in 206, stated *infra*, p. 374.

Suggested extension of rule as stated.

In *Re Waugh*, *Waugh* v. *Cripps*, [1903] 1 Ch. 744; 72 L. J. 586 (a case on a will), Farwell, J., suggests that the rule ought t

xtended as follows : " If the person to whom the limitation over is ade be capable of being the collateral heir of the first devisee, or the event on which the gift over is made necessarily depends on e existence of a collateral heir of the first devisee on such first evisee's death, the first devisee takes only an estate tail " : p. 747. appears, however, that in the case in question the rule as stated bove would have been sufficient. The limitation being " No. 12 go to . . . Elizabeth Graham and her heirs, and No. 9 to go . . . William Graham and his heirs, if either the said Elizabeth William should die without an heir their share is to go to the rvivor's heir or heirs," William and Elizabeth being brother and ster.

In limitations to A and the heirs of his body, qualification of heirs is allowed.

There may be added to a limitation to " A and the heirs of his body " the qualification that they shall be begotten on a particular woman, or that they shall be male or female.

New Law.

By section 60, sub-section 4 of the Law of Property Act, 1925, it provided that in the case of deeds executed after 1881 it is fficient, in the limitation of an estate in tail male or in tail male, to use the words " in tail male " or " in tail female," ithout the words " heirs male of the body " or " heirs female of e body." This section preserves section 51 of the Conveyancing ct, 1881.

The rule above is implied in the quotations from Litt. s. 31; . Litt. 13 a; Co. Litt. 20 b, given, *supra*, pp. 335 and 336; and, course, limitations in special tail and in tail male are quite mmon, though limitations in tail female do not occur in practice.

Designation of person of whose body the heirs are to be.

The importance of pointing out from what person the heirs are proceed (see *Idle* v. *Cook* (1705), 1 P. Wms. 70; Holt, 164; Mod. 57; Salk. 620; 2 Ld. Raym. 1144) will appear when the llowing limitations to a husband and wife are considered; they do t differ much in form, but it will be found in every case that the tate tail vests in that person from whose body the heirs are to oceed.

Heirs *of* the body and heirs *on* the body distinguished.

The distinction between heirs *of* the body, and heirs *on* the dy, must be attended to : where " heirs *of* the body of the sband begotten by him *on* the body of the wife " : Co. Litt. 26 a, (3); or " A and his heirs on the body of his wife begotten " : *St. hn* v. *Valencia* (1286), 1 Roll. Abr. 837, s. 1; or on the body of y woman whom he may lawfully marry : *Chudleigh's Case* (1595), Rep. 120 a, at p. 140 b; *S. C. sub nom. Dillon* v. *Fraine*, Pop. 70 p. 77; *sub nom. Dillam* v. *Frain*, 1 Anders. 309, are spoken of, e heirs intended are the heirs of the body of the husband, but ey are restricted by the words " on the body of the wife " to a

particular class of the heirs of the body of the husband, namely those that he has by her. "Heirs begotten by the husband *of* th body of the wife," mean "heirs of the body of the wife," but the are restricted to the heirs begotten by the husband : Co. Litt. 26 a n. (3). On the other hand, "heirs begotten by the husband *on* th body of the wife," means the heirs of their two bodies, because th word "heirs" is not applied to the one more than the other : Co Litt. 26 a, n. (3). See Shep. Touch. 103.

Gift to A and his wife and the heirs of the body of A; in th case A has an estate in tail general, and the wife an estate fo life : Litt. s. 26.

Gift to A and his wife and the heirs of A, which he shall beg on the body of his wife; here A has an estate in special tail, an the wife an estate for life : Litt. s. 27.

Gift to A and his wife and the heirs of the body of the wife b A begotten; here the wife has an estate in special tail, and A a estate for life only : Litt. s. 28; *Repps* v. *Bonham* (1608), Yelv 131; 1 Brownl. & G. 211; *S. C., sub nom. Reps* v. *Babham*, Lan 17; *Denn* v. *Gillot* (1788), 2 T. R. 431; 1 R. R. 516.

Gift to the husband and wife and the heirs "which the husban shall beget on the body of the wife," or, "of the body of th husband and wife"; here they both take an estate tail : Lit s. 28; Co. Litt. 26 a, n. (3); *Repps* v. *Bonham* (1608), Yelv. 131; Brownl. & G. 211; *S. C. sub nom. Reps* v. *Babham*, Lane, 17; *Den* v. *Gillot* (1788), 2 T. R. 431; 1 R. R. 516; *Williams* v. *Willia* (1810), 12 East, 209; 11 R. R. 357.

The same principles are applicable to ascertain in whom th estate tail vests, when such estate is preceded by estates for li limited to the husband and wife in succession : *Alpass* v. *Watki* (1800), 8 T. R. 516; *Williams* v. *Williams* (*supra*).

Begotten includes to be begotten.

If the words used are "heirs of his body begotten," the wo "begotten" extends to issue afterwards begotten, and "to b begotten," to issue already begotten : Co. Litt. 20 b, and notes (3 and (A). So does "hereafter to be begotten" : *Hebblethwaite* v *Cartwright* (1734), Ca. t. Talbot, 31. See *per* Wood, V.-C., *Gab* v. *Prendergast* (1855), 1 K. & J. 439, at p. 442; 24 L. J. Ch. 431 103 R. R. 169.

"*In posterum procreandis.*"

But where A made a feoffment to the use of his younger son i tail, with remainder to the use of the heirs of A's body "*posterum procreandis*," it was held that a special tail was create excluding issue already born : *Anon.* (1584), 3 Leon. 87. And it pointed out by Lord Ellenborough, C.J., in *Doe* v. *Hallett* (1813 1 M. & S. 124, at p. 136; 14 R. R. 408, that the feoffor's passing b the eldest son in the first instance was a very important circum stance to indicate an intention to exclude him altogether.

A limitation in tail general may be cut down to one in tail male, e word "male" being supplied by the context.

"Male" supplied by context.

Settlement on C for life, remainder to his heirs on the body of s wife to be begotten, "the male to be preferred before the female d the elder brother before the younger." *Held*, that C took an tate in tail male : *Denn* v. *Hobson* (1770), 2 Wm. Bl. Rep. 695; Burr. 2609.

The construction of a limitation to "A and B, and the heirs of eir bodies," depends upon whether (1) A and B are persons able to marry, or (2) are husband and wife, or persons able to arry.

To A and B and heirs of their bodies.

(1) If A and B are persons unable to marry (either two men two women, or a man and woman within the prohibited degrees), ey are joint tenants for life, with several inheritances : Litt. 283, 284; Co. Litt. 182 a, 184 a; 1 Fearne, C. R. 36; *Smye Chown* (1589), 1 And. 264; *S. C. sub nom. Smy* v. *June*, Cro. iz. 219; *sub nom. Cotton's Case*, 1 Leon. 211; *sub nom. Anon.*, v. 127; *Matthews* v. *Temple* (1698), Comb. 467; *S. C. sub nom. ssex* v. *Temple*, 1 Ld. Raym. 310.

Where A and B unable to marry.

(2) If A and B are husband and wife, or a man or woman who n marry, they take an estate in special tail in the entirety : Y. B. Hen. 4 (1410), 1, pl. 3; Co. Litt. 25 b; 1 Fearne, C. R. 35 : *mond's Case* (1567), Moore, 92; *S. C. sub nom. Anon.*, 4 Leon. 3, ca. cccxvii is *contra*, but cannot be relied on.

Where A and B husband and wife, or can marry.

So if the limitation be to husband and wife for their lives and the of the survivor, remainder to the heirs of their bodies, they take estate in special tail in the entirety : Bro. Abr. Estates, 75.

An estate tail may be created by words of reference.

Estate tail by reference.

If the heirs of the body of A are mentioned and then follows a itation to A and his heirs aforesaid, this is tail : Y. B. 42 w. 3 (1368), 5.

If a man gives lands to A "*et heredibus de corpore suo*," the ainder to B (Co. Litt. 20 b), or "to B and his heirs" (Shep. ch. 104), "*in forma praedicta*," this is a good estate tail. See *Gilmore* v. *Harris* (1685-93), 3 Lev. 213; Carth. 292; Skin. ; *Goodright* v. *Rigby* (1792), 2 H. Bl. 46; 2 R. R. 564.

In construing the limitations in a settlement, the words "heirs," or "heirs of the body," may, by the use of a parenthesis, or by punctuation, be construed as applying to all the children, or to all the sons, as the case may require.

In settlements "heirs" extended to all the children by parenthesis, punctuation, etc.

Where the limitations in a marriage settlement were (after prior tations) "to the use of all and every the child or children lly, share and share alike, to hold the same as tenants in

common and not as joint tenants, and if but one child, then to su
only child, his or her heirs or assigns for ever," it was held that t
words "to hold the . . . then to such only child" might be p
into a parenthesis so as to make the limitation run "to the use
all and every the child and children equally, share and share alik
his or her heirs or assigns," and thus to give estates in fee simp
to the children : *Doe* v. *Martin* (1790), 4 T. R. 39; 2 R. R. 324.

Limitations to the use of N for life, remainder to trustees
preserve, etc., remainder (subject to a term) to the use of the fi
son of the body of N, lawfully issuing, and for default of such issu
to the use of the second, third, fourth, etc., and of all and eve
son and sons of N lawfully issuing severally and successively
remainder one after another, as they and every of them sh
happen to be in priority of birth and seniority of age, and of t
several heirs male of the body and bodies of all and every such s
and sons respectively issuing. *Held*, that the only son of N to
an estate in tail male : *Owen* v. *Smyth* (1796), 2 H. Bl. 594;
R. R. 513.

Marriage settlement to the use of J for life, remainder to truste
to preserve, etc., remainder (subject to terms for portions, etc.),
the use of the first son of the body of J by A his intended wi
and for default of such issue, to the use of the second, third, a
other sons of the body of J by A, severally and successively as th
should be in seniority of age, and of the several heirs male of th
respective bodies, and for default of such issue, then, in case
should be *enceinte* by J, to the use of P till A should be delivere
in trust for such afterborn child or children; and in case such shou
be a son or sons, to the use of such afterborn son and sons severa
and successively as they should be in priority of birth, and t
heirs male of the body and bodies of such afterborn son and so
Held, that the first son of J by A, born during his life, took
estate tail : *Galley* v. *Barrington* (1824), 2 Bing. 387; 27 R. R. 66
10 J. B. Moore, 21.

A limitation "to the use of M and such other daughter
daughters as F shall or may have or beget on the body of K,
wife, if any, share and share alike, and if no other daughter save t
said M, then the said premises to go and descend to the said
her heirs and assigns for ever." It was observed by Sugden, L.
that "in construing such limitations, by punctuation, or by the
of a parenthesis, the words 'heirs and assigns,' may be extend
in their application, and instead of being confined to one daugh
may be referred to all the daughters of the marriage, if more th
one" : *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1, at p.
59 R. R. 617. See also *Re Denny's Estate* (1874), Ir. R. 8 Eq. 4
and *Giltrap* v. *Earl*, [1919] Ir. R. Ch. 53.

A limitation in fee simple or fee tail cannot be made to cease by defeasance, condition or executory gift over on the owner exercising any act of dominion thereover; any defeasance, condition or executory gift over purporting to defeat or give over the estate on the exercise of any such act is void for repugnancy: Litt. s. 360; Co. Litt. 223 a *et seq.*; *Corbet* v. *Corbet* (1888), 14 P. D. 7, where the rule was applied to an equitable fee simple and personalty held in trust.

Owner in fee simple or tail cannot be restrained from alienation.

The only exception to this rule for which there is any authority that a condition not to alienate to a given person, or class of ersons, or in mortmain is valid: Litt. s. 361; Co. Litt. 223 a; hep. Touch. 129. Sir George Jessel seems to have been prepared extend the exception to any restrictions on the right of alienation long as they did not prohibit alienation altogether: see *Re lacleay* (1875), L. R. 20 Eq. 186; 44 L. J. Ch. 441; but it is subitted that his *dicta* in that case, which was not argued, cannot be ipported: see *per* Pearson, J., *Re Rosher; Rosher* v. *Rosher* 1884), 26 Ch. D. 801; 53 L. J. Ch. 722. All the cases arise on ills and are collected in Theobald on Wills (8th ed.), p. 711.

Condition not to alienate to a class or in mortmain.

The above rule is modified by the peculiar circumstances attachg to property limited to a married woman for her separate use ith a restraint on anticipation.

Separate use of married women.

The rule does not apply to alienation of reversionary interests efore they fall into possession.

Reversionary interests.

In *Barnett* v. *Blake* (1862), 2 Dr. & Sm. 117; 117 R. R. 736, land as granted to trustees upon certain trusts during certain lives, and en to convey unto certain children with a declaration that if any ild previous to the conveyance of his share should have alienated , such share should go over to the others. This clause was held to vest a share which one of the children had purported to alienate, d no one suggested the provision was invalid. In *Corbet* v. *orbet* (1888), 14 P. D. 7, the document in which case was a deed oved as a will, are *dicta* to the effect that alienation of versionary interests can be restricted.

A limitation to the heirs of a deceased person confers a fee simple on the person who happens to be his heir.

Limitation to heirs or heir of deceased person.

After 1925 a limitation of real or personal property in favour of e heir, either general or special, of a deceased person which, if nited in respect of freehold land before 1926, would have conferred

New Law.

New Law.

on the heir an estate in the land by purchase, operates to confer a equitable interest upon the person who would, either at the deat of the deceased, or at the time named in the limitation, hav answered the description of the heir, either general or special, if th general law in force before 1926 had remained unaffected. Se section 132, sub-section 1 of the Law of Property Act, 1925.

The authorities are : Y. B. 11 Hen. 4 (1410), 74, pl. 14; cite Williams on Real Property, pt. 3, c. 2 (24th ed.), p. 425, n. D *Marshall* v. *Peascod* (1861), 2 J. & H. 73; 134 R. R. 129. Such fe simple, if limited by deed since 1833, descends as if the decease person had been the purchaser (3 & 4 Will. 4 (1833), c. 10 s. 4 (*b*)). As to what was the exact nature of the estate prior t that Act, see the discussion in Challis, R. P. (3rd ed.), pp. 29 *et seq.*

"Heir" is sufficient.

The rule applies where the word is "heir" in the singular Y. B. 12 Edw. 4 (1472), 2, pl. 7; *Marshall* v. *Peascod* (*supra*), a p. 75.

Co-parceners.

If the heirs are co-parceners (*c*) they take as joint tenants; *Beren* v. *Fellowes* (1887), 35 W. R. 356; *Re Baker*, *Pursey* v. *Hollowa* (1898), 79 L. T. 343; *Owen* v. *Gibbons*, [1902] 1 Ch. 636; 7 L. J. Ch. 338; the two latter are cases on wills.

Where grantor is the heir.

If the grantor is himself the heir of the deceased person, such limitation, if contained in a deed prior to 1834, is void and th grantor, or if he took by descent the person whose heir he was and not the deceased person, is the root of descent : *Cholmondele* v. *Clinton* (1819-21), 2 B. & Ald. 625; 21 R. R. 419; 4 Bli. 1 *Moore* v. *Simkin* (1885), 31 Ch. D. 95; 55 L. J. Ch. 305; but contained in a deed since 1833, vests a new estate in the grantor a purchaser : 3 & 4 Will. 4 (1833), c. 106, s. 3.

Heirs of E and J.

A limitation to "the heirs of E deceased and J, their heirs an assigns, as tenants in common" vests one moiety of the estate i the heir of E and the other moiety in J (not in his heir) : *Hawes* v *Hawes* (1880), 14 Ch. D. 614.

"Heirs" as purchasers means the heir-at-law.

The heir at common law will take under a limitation to th "heirs" or "heir" as purchasers.

"If a lease for life [of lands of the nature of gavelkind] be mad the remainder to the right heirs of B, and B dieth, his eldest so only shall inherit, for he only to take by purchase is right heir b the common law. So note a diversity between a purchase and

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New Law.

(*b*) This Act, as amended by section 19 of the Law of Property (Amendmen Act, 1859, is still applicable for ascertaining the devolution of entailed interes as equitable interests and for ascertaining who are to take equitable interests heirs by purchase. It no longer applies to intestacies, save only in the case a lunatic or defective as provided by the Administration of Estates Act, 192 s. 51, sub-s. 2.

(*c*) In the case of persons dying after 1925 coparcenary is abolished in la

escent" : Co. Litt. 10 a. Mr. Hargrave in his note on this passage ays : "The reason seems to be that though the subject of the gift *customary* land, the heir at *common law* is presumed to be meant, nless words are added to describe the *customary* heir. But if such pecial words are used, the presumption fails; and then it is said hat though the subject of the gift is common law land, yet the ustomary heir shall be preferred." The following are cases on ills : *Roberts* v. *Dixwell* (1738), 1 Atk. 607; *Thorp* v. *Owen* (1854), Sm. & Giff. 90; 23 L. J. Ch. 286; 97 R. R. 127; *Sladen* v. *Sladen* 1862), 2 J. & H. 369; 134 R. R. 263; *Garland* v. *Beverley* (1878), Ch. D. 213; 47 L. J. Ch. 711 (where the land was gavelkind); *aslewood* v. *Green* (1860), 28 Beav. 1; 126 R. R. 1 (where there as a mixed gift of realty and personalty); *Polley* v. *Polley* (1862), 1 Beav. 363; 135 R. R. 472 (where the land was borough nglish).

In limitation to "heirs" as purchasers, qualification of heirs is allowed.

Under a limitation to the "heirs" of any person, with a superadded qualification, such as "male," as purchasers, the heir taking by purchase must possess that qualification.

This rule does not apply where the words are "heirs of the ody." See *infra*, p. 352.

This is discussed in *Cholmondeley* v. *Clinton* (1817-21), 2 Mer. 1, at p. 344; 2 Jac. & W. 1, at pp. 77 and 106 *et seq.*; 22 R. R. ; *Counden* v. *Clerke* (1612), Hob. 29; Moore, 860; *Doe* v. *Perratt* 833), 10 Bing. 198; *Wrightson* v. *Macaulay* (1845), 14 M. & W. 4; 15 L. J. Ex. 121; 69 R. R. 679; *Thorpe* v. *Thorpe* (1862), 1 H. C. 326; 32 L. J. Ex. 79; 130 R. R. 546 (all cases on wills). See so Mr. Hargrave's note (3), Co. Litt. 24 b; 2 Jarman on Wills, 40, s. 1 (6th ed.), pp. 1566-9. For the meaning of "nearest ale heir" see *Lightfoot* v. *Maybery*, [1914] A. C. 782; 83 L. J. . 627 (a case on a will).

Immediate limitation to heirs of a living person.

An immediate limitation to the heirs of a living person, whether e grantor or not, seems to be merely void : *Davis* v. *Speed* (1692), lt, 730; Skin. 351; 4 Mod. 153; 12 Mod. 38; 2 Salk. 675; Carth. 2; affirmed on appeal in Dom. Proc. (1698), Show. P. C. 104.

Remainder to heirs of a living person.

A limitation in remainder to the heirs of a living person, who is not the grantor, and who takes no prior estate of freehold, confers a contingent remainder in fee simple on the person who is his heir-at-law at his death. See Co. Litt. 378 a; Wms. Real P. (24th ed.), pt. 3, c. 2; *Tipping* v. *Piggot* (1713), 1 Eq. Ca. Ab. 384, pl. 2; Gilb. Eq.

34; *S. C. sub nom. Sir Thomas Tipping's Cas*
cited 1 P. W. 359. Such estate, if limited by dee
since 1833, descends as if the living person had bee
the purchaser: 3 & 4 Will. 4 (1833), c. 106, s. 4

New Law. It is submitted that a similar limitation after 1925 would conf
an equitable interest in remainder upon the person who, on t
death of the "living person" or at the time named in the limit
tion as the case may be, answers the description of that livi
person's "heir" on the application of the general law in for
before 1926 with regard to freehold land.

"If a lease for years be made to A the remainder to B in ta
the remainder to the right heirs of A, there the remainder veste
not in A, but the right heirs shall take by purchase if A die duri
the estate tail": Co. Litt. 319 b. See *Tapner* v. *Merlott* (1739
Willes, 177; and see Jenk. 248, ca. xxxviii.

Remainder to heirs of grantor.

A limitation, either at Common Law or under the Statute
Uses, in remainder to the heirs of the grantor, contained in
deed prior to 1834, left the reversion in fee simple in the grant
even if no prior estate of freehold was given to him by the co
veyance: see 1 Fearne, C. R. 51; Burton, s. 335; but if made
a deed after 1833, such a limitation vests a new estate in t
grantor as purchaser: 3 & 4 Will. 4 (1833), c. 106, s. 3.

"If a man seised of lands in fee make a feoffment in fee, a
depart with his whole estate, and limit the use to his daughter f
life, and after her decease to the use of his son in tail, and after
the use of the right heirs of the feoffor; in this case, albeit
departed with the whole fee simple by the feoffment, and limit
no use to himself, yet hath he a reversion": Co. Litt. 22 b. Se
to the same effect, *Fenwick* v. *Mitforth* (1594), Moore, 284; *S.*
sub nom. Milford v. *Fenwike*, 1 Anders. 288; *sub nom. Fennick a*
Mitford's Case, 1 Leon. 182; *sub nom. Read* v. *Erington*, Cro. El
321. See also *Bingham's Case* (1600), 2 Rep. 82 b; *Godbold*
Freestone (1694), 3 Lev. 406; *Abbot* v. *Burton* (1708), Salk. 59
11 Mod. 181; Com. Rep. 160; and see Jenk. 248, ca. xxxviii a
267, ca. lxxvii. Lord Coke (*loc. cit.*) goes on to explain that t
grantor takes an implied use during his life, so that the heirs cou
not be purchasers; but the rule was the same where the limitatio
were such that no estate for life could be implied in the grant

F made a feoffment in fee to the use of himself for yea
remainder to the use of J, then his second son, and the heirs ma
of his body, remainder to the use of the right heirs of F. *He*
that the limitation of the use of the heirs of the feoffor was the c
use, and was executed in the feoffor as the reversion in fee, and n
as a remainder; *Bedford* v. *Russell* (1593), Pop. 3; Moore, 71

Anders. 197; cited 1 Rep. 130 a; *Godbold* v. *Freestone* (1694), Lev. 406.

Copyholds.

It used to be thought that the rule did not apply to the rrender of a copyhold, so that where A surrendered to the use of for life with remainder to the right heirs of A, the heirs of A took purchase: *Allen & Palmer's Case* (1587), 1 Leon. 101; but is view appears to be incorrect, see 1 Fearne, C. R. 67 *et seq.*; *oe* v. *Griffits* (1766), 4 Burr. 1952; *Thrustout* v. *Cunningham* 775), 2 Wm. Bl. Rep. 1046.

Executory trusts.

But where there is a direction to convey in certain events to the irs of the grantor, the person who on the happening of those ents is his heir takes as purchaser: *Locke* v. *Southwood* (1831), My. & Cr. 411; 43 R. R. 221; affirmed on appeal in Dom. Proc. *b nom. Bush* v. *Locke* (1835), 3 Cl. & F. 721; 9 Bli. (N.S.) 1. e *Davis* v. *Kirk* (1856), 2 K. & J. 391; 110 R. R. 285.

Limitation to heirs of body of deceased person.

A limitation to "the heirs of the body" of a deceased person confers an estate tail on the person who happens to be heir of the body of the deceased person; such estate tail, whether limited by deed before 1834, or since 1833, descends as if the deceased person had been the purchaser: 3 & 4 Will. 4 (1833), c. 106, s. 4.

New Law.

It might be that such a limitation made after 1925 would be ld to confer an entailed interest upon the person who under the neral law in force before 1926 in respect of freehold land answered e description of "heir of the body" of the deceased person at the te of his death, or at the time named in the limitation.

In *Mandeville's Case*, Y. B. 2 Edw. 3 (1328), pl. 1 and 2; Co. t. 26 b; Fitzh. Abr., Taile, pl. 7 and 23, John de Mandeville, his wife Roberge, had issue Robert and Maude and died. chael de Morevill gave land to Roberge and to the heirs of John de ndeville, her late husband, on her body begotten. It was held t Roberge took an estate for life only, that the limitation to the rs of the body of John de Mandeville operated as words of chase, that the fee tail vested in Robert by purchase, and that his death without issue it vested in Maude by descent. See 1 arne, C. R. 82, note.

In *Vernon* v. *Wright* (1858), 7 H. L. C. 35; 28 L. J. Ch. 198; R. R. 26, the rule was applied to a devise to "the right heirs my grandfather S, deceased, by M, his second wife, for ever." was held that the words "heirs by his second wife," must be strued as "heirs of the body of S lawfully begotten on the body

of M, his second wife," and that the words "for ever," did n enlarge the estate into a fee simple.

"Heirs male of the body" as purchasers.

Under a limitation to the "heirs of the body of any person with a superadded qualification, su as male (or female), as purchasers, the person taki need not be heir general of the body.

Considerable discussion has taken place on the question wheth a person, taking by purchase under the description of heir male heir female of the body, must be heir general of the body. Co says (Co. Litt. 24 b): "If A hath issue a son and a daughter, a a lease for life be made, the remainder to the heirs females the body of A; A dieth, the heir female can take nothing becau she is not heir." In other words, in Coke's opinion, it was nec sary that the heir male (or female) should be a male (or fema being also heir general. The modern doctrine is that by heir m (or female) of the body is meant the person who would have be heir in tail, if an estate in tail male (or in tail female) had be given to the ancestor. See Hawkins on Wills, 204 (3rd ed.); Dav. Prec. 344 and 345, note; Mr. Hargrave's note (3) Co. Li 24 b; 2 Jarman on Wills, c. 40, s. 1, p. 1560. See also *Lightfoot Maybery*, *supra*, p. 349.

The distinction may be exemplified as follows: Let the gift be the heir female of the body of A who has a son and a daught both of whom die in his lifetime, the daughter having a son a the son having a daughter; then, according to Coke's doctrine, t daughter of the son would be the heir female, because she wou be heir general and also a female; while, according to the mode doctrine, there would be no heir female. As another example, the daughter leave a daughter and the son leave a son; the according to Coke, there would be no heir female, for the son's s is heir general, but is not a female. But according to the mode doctrine, the daughter's daughter would be heir female, because s would be heir if only females could inherit; or, to use other word she would have been heir in tail if an estate in tail female had be given to the ancestor.

Where in a settlement there was a limitation in remainder " the use of the heirs male of the body of A," and A died, leavi his granddaughter his heir-at-law, and two sons, W, the elder, a H, it was held that on W's death without issue, H took as he male of the body of A: *Wills* v. *Palmer* (1770), 5 Burr. 261 2 Wm. Bl. Rep. 687; 1 Fearne, C. R. 45 (10th ed.).

Settlement of land to the use (subject to prior limitations) of t sons of the intended marriage successively in tail male, "and f

nt of such issue, to the use of the heirs female of the body" of intended husband begotten on the body of the intended wife l her or their heirs, remainder to the right heirs of the husband. *ld*, that a daughter of the marriage was to be preferred to the nddaughter of the son of the marriage who was the testator's r-at-law: *Goodtitle* v. *Burtenshaw* (1772), 1 Fearne, C. R. p. 570 (10th ed.).

Limitation to the heir (in the singular) female of the body of the :lor; there being one son, heir-at-law, and four daughters. *Held*, t the daughters took as joint tenants for life: *Chambers* v. *ylor* (1837), 2 My. & Cr. 376; 6 L. J. Ch. 193; 45 R. R. 94.

An immediate limitation to the heirs of the body of a living son seems to be merely void.

Immediate limitation to heirs of body of living person.

Remainder to heirs of body of living person.

A limitation in remainder, under the Statute of Uses "to the use of the heirs of the body" of a living person, whether the grantor or not, or at Common Law "to the heirs of the body" of a living person, who is not the grantor, who takes no prior estate of freehold, confers a contingent remainder in tail on the person who at the death of such first-mentioned person is the heir of his body, descendible as if such first-mentioned person had been the first taker, whether limited by deed before 1834, or since 1833: 3 & 4 Will. 4 (1833), c. 106, s. 4.

New Law.

The Statute of Uses having been repealed with regard to ings taking effect after 1925 the above rule is of diminishing ortance. A limitation in remainder "to the heirs of the y" of a living person who takes no prior estate, if purported be made after 1925, would, it seems, operate to confer an iled interest in remainder upon the person who at the death of "living person," or at the time named in the limitation, as case may be, would have answered the description of that g person's "heir of the body," if the general law in force in rd to freehold land before 1926 had remained unaffected.

limitation to "A and the heirs of the body of his father," e the father is dead, and A is his eldest son, gives A an estate Co. Litt. 26 b; Shep. Touch. 104. If the father is alive, it is state for life in A, with a contingent remainder to the heir of body of the father. The distinction between the above limita- and one "to A and *his* heirs of the body of his father," *ante*, 35, should be noticed.

"It seems that if land be given to the younger son, and to heirs of the body of the father begotten, the father being dead the time, that now the eldest shall take as joint purchaser 3 Edw. 3 (1329), 28, where land is given to J S and to his eld son": Vaillant's note to Anon. (1566), Dyer, 247 b, pl. 76.

Limitation by marriage settlement to use of A (the settlor) a his heirs till the marriage, afterwards to the use of the wife for l remainder to the use of trustees and their heirs during the life A, remainder to the use of the sons of the marriage successively tail, remainder to the use of the heirs of the body of A, remain to A in fee. *Held*, that the limitation to the heirs of the body o was a contingent remainder to the heir of his body: *Tippin Tipping* v. *Cosin*, *Cosins*, *Cozens*, or *Coson* (1694), Carth. 272; H 731; 1 Ld. Raym. 33; Comb. 312; 4 Mod. 380; 1 Fearne, C. 43. See, to the same effect, *Else* v. *Osborn* (1717), 1 P. Wms. 3 2 Eq. Ca. Ab. 702, pl. 3; *S. C.* differently reported *sub nom. Elie Osborne*, 2 Vern. 755; *sub nom. Elice* v. *Osborne*, 1 Eq. Ca. 385, pl. 3.

Limitation to A., remainder to heirs of the bodies of A. and B.

Where A and B are husband and wife, a limitation to A for l with remainder to the heirs of the bodies of A and B, creates an estate tail in A, but a contingent remainder in tail in the h of the bodies of both A and B. See *Anon.* (1554), Dyer, 99 pl. 64; *Gossage* v. *Tayler* (1652), Styl. 325, cited by Buller, from a MS. note, 2 T. R. 435; *Frogmorton* or *Throgmor* v. *Wharrey* (1770), 2 Wm. Bl. Rep. 728; 3 Wils. 125, 1 see also *Lane* v. *Pannell* (1615), 1 Roll. Rep. 238, 317, 4 Anon. (1557), 3 Leon. 4, pl. 10, must be considered as overrul see 1 Fearne, C. R. 38.

Remainder to heirs of body of grantor.

A limitation in remainder to the heirs of the body of the gran at Common Law is void.

"For the donor cannot make his own right heire a purchaser an estate tail without departing of the whole fee simple out him": *Greswold's Case* (1556), Dyer, 156, pl. 24; Co. Litt. 22 1 Fearne, C. R. 51 (10th ed.); 1 Sand. Uses, 136.

The above rules as to limitations, whether in fee simple or tail, to the heirs of living persons only apply where such liv persons take no estate of freehold under limitations contained the same deed, for—

Rule in *Shelley's Case.*

> Where the ancestor takes an estate of freeho whether by limitation or resulting use, and in t same instrument an estate is limited by way remainder, either mediately or immediately, to "heirs" or "heirs of the body," the w

"heirs" is a word of limitation and not of purchase, and therefore the ancestor takes an estate in fee simple or in tail, as the case may be.

New Law.

By section 131 of the Law of Property Act, 1925, the rule in *elley's Case* is abolished as regards instruments coming into eration after 1925. Where by such an instrument an interest in y property is expressed to be given "to the heir or heirs or issue any particular heir or any class of the heirs or issue" of any rson which, under the old rule of law known as the rule in *elley's Case*, would have given to that person an interest in fee nple or an entailed interest, such words shall operate in equity words of purchase and not of limitation. But recourse must still had to the old law in order to discover the person or persons o answer the description of "heir."

Now that personalty can be entailed, *quaere* the effect of a t of personalty in form "to A for life, remainder to the heirs his body"—the rule in *Shelley's Case*, of necessity, never ving been applicable under a purported disposition of this nature der the old law.

The old rule was called the rule in *Shelley's Case*, but the rule did originate in that case—it is as old as a case in Y. B. 18 Edw. 2 22) fo. 577, translated in a note to *Harrison* v. *Harrison* (1844), Man. & Gr. 938, at pp. 941 *et seq.* The rule is also discussed in *elley's Case* (1581), 1 Rep. 93 b; 1 Fearne, C. R. (10th ed.), 28 *seq.*; Challis, R. P. (3rd ed.), 152 *et seq.*; Mr. Thomas' note I. o *Shelley's Case*, in 1 Coke's Reports by Fraser, pp. 262 *et seq.*; rd Macnaghten's speech in *Van Grutten* v. *Foxwell*, [1897] A. C. , at pp. 667 *et seq.*; and in Goodeve's R. P. (5th ed.), pp. 222-4. "Here it appeareth that where the ancestor taketh an estate of hold, and after a remainder is limited to his right heirs, that fee simple vesteth in himself, as well as if it had been limited him and his heirs; for 'his right heirs' are in this case words imitation of estate, and not of purchase. Otherwise it is where ancestor taketh but an estate for years: as if a lease for years made to A the remainder to B in tail, the remainder to the right s of A, there the remainder vesteth not in A, but the right heirs l take by purchase if A dies during the estate tail . . . And so it A makes a feoffment in fee to the use of B for life, and after he use of C for life or in tail, and after to the use of the right s of B. B hath the fee simple in him as well when it is by tation of use, as when it is by act executed": Co. Litt. 319 b.

Estate of ancestor determinable.

It makes no difference that the estate of the ancestor may determe during his own lifetime, as in *Merrill* v. *Rumsey* (1665), 1 Keb. ; 1 Sidf. 247, pl. 12; T. Raym. 126, where a conveyance was

made to husband and wife for their joint lives, and after the decea of either, to her heirs by him begotten, and it was held to be tail the wife; or, as in *Curtis* v. *Price* (1805), 12 Ves. 89; 8 R. R. 30 where the estate limited to the ancestor was during widowhood onl

Vested and contingent remainders interposed.

The fee simple, or fee tail, which the ancestor takes under t rule in *Shelley's Case*, is of course subject to all the other limit tions contained in the deed, so far as such limitations are vali and even under the old law, contingent remainders interpos between the limitation to the ancestor and that to his heirs we not destroyed. The estate of inheritance in the ancestor w considered to be executed *sub modo* only, and so as to open and l in the contingent estates if they vested in the lifetime of t ancestor: *Lewis Bowles's Case* (1615), 11 Rep. 79 b; Tud. L. Real P. p. 86 (4th ed.).

Ancestor taking estate by resulting use.

An estate of freehold in the ancestor by resulting use (or, as it often incorrectly termed, implication) only is sufficient: *Pibu Pybus*, or *Bipus* v. *Mitford* or *Milford* (1674), 1 Vent. 372; Mod. 98, 121 and 159; 3 Keb. 129, 239, 316 and 338; 2 Lev. 7 Sir T. Raym. 228; 1 Freem. 351 and 369; *Wills* v. *Palme* (1770), 5 Burr. 2615; 2 Wm. Bl. Rep. 687, in which case the is great difficulty in understanding that part of the certifica which says "that if a third person had been the grantor, Hen would have taken an estate in tail male by purchase." Willia was at Archdale's death the heir male of his body, so that would have taken an estate in tail male by purchase, and Hen would have taken by descent from him according to the doctrine *Mandeville's Case*, *supra*, p. 351. Possibly all that was meant w that Henry would not have taken by descent from Archdale. S 1 Fearne, C. R. 82. The case is discussed, 1 Fearne, C. R. 45; s also *Southcote*, *Southcott*, or *Southcot* v. *Stowell* (1677), 1 Mo 226, 237; 2 Mod. 207; 1 Freem. 216, 225; 3 Keb. 704.

Copyholds.

The rule applied to limitations of copyholds: *Allen and Palme Case* (1587), 1 Leon. 101; see 1 Fearne, C. R. 66 *et seq.* (10th ed and to limitations of gavelkind lands: *Doe* v. *Harvey* (1825), B. & C. 610.

It is doubtful whether under the law in force before 1926 t rule in *Shelley's Case* had any application where the latter limi tion was "not to the heirs of the body of the taker for life, b to the taker for life and the heir or heirs of his body": *Doe Welford* (1840), 9 L. J. Q. B. 334.

Both limitations must be in same instrument.

The two limitations must be in the same instr ment: a deed executing a power is for this purpo the same instrument as the deed creating it.

See *per* Dyer, C.J., in *Cranmer's Case* (1573), 2 Leon. 5,

7; *Snowe* v. *Cuttler* (1664), 1 Lev. 135; *Moor* v. *Parker* (1694), Mod. 316; 1 Ld. Raym. 37; Skin. 558; 1 Eq. Ca. Ab. 182, pl. 22; *oe* v. *Fonnereau* (1780), 2 Doug. 487.

Deeds exercising powers.

The question whether a deed in execution of a power is to be nsidered as part of the instrument conferring the power, so as to ake limitations in the two instruments coalesce according to the le, has been much discussed: see Co. Litt. 299 b, n. (1); 1 earne, C. R. 74; 1 Prest. Est. 309; 2 Jarman on Wills, c. 48 (1), 1861 (6th ed.). In Sugden on Powers (8th ed.), p. 472, Lord . Leonards says: "In *Venables* v. *Morris* (1797), 7 T. R. 342; R. R. 455, the very question arose. Under a settlement, the ısband was tenant for life, remainder to trustees and their heirs nerally to preserve remainders, with remainder (after several es which never arose) to such uses as the wife should appoint. ıe appointed to the right heirs of her husband. The Court timately held that the fee simple vested in the trustees, so that e estate limited under the power being merely equitable, could t unite with the limitation to the husband for life in the deed, ıich was a legal estate; but Lord Kenyon treated it as quite a ar point, that the appointment was to be considered in the me light as if it had been inserted in the original deed by which e power of appointment was created; and therefore he held at, if the limitation to the heirs of the husband had been a legal ate, it would have enlarged the estate in the ancestor, and ven him a fee. The point may be considered as settled."

Rule applies to equitable limitations.

The rule in *Shelley's Case* applies to equitable limitations, but the limitations must be both legal or both equitable.

One limitation legal and one equitable.

The rule does not apply where one limitation is legal and the ıer is equitable: *Tippin* or *Tipping* v. *Coson, Cosin, Cosins* or *zens* (1694), 4 Mod. 380; Carth. 272; Holt, 731; 1 Ld. Raym. ; Comb. 312; *Lord Say and Seal* v. *Lady Catherine Jones* (1729), Bro. P. C. 113; *Venables* v. *Morris* (1797) (*supra*); *Ireson* v. *arman* (1825), 3 B. & C. 799; 3 L. J. (o.s.) K. B. 119; 27 R. R.); nor *semble* where one limitation is in form legal and the ıer in form equitable, but both are really equitable by reason the legal estate being outstanding: *Coape* v. *Arnold* (1855),). M. & G. 574, at p. 587; 24 L. J. Ch. 673; 102 R. R. 287. *White and Hindle's Contract* (1877), 7 Ch. D. 201; 47 L. J. Ch. which is *contra*, is probably wrong. See also *Re Hobbs*, [1917] h. 569, at p. 596; 86 L. J. Ch. 409 (case of a will).

Words added to limitation to ancestor.

The rule applies even if words are added to the limitation to the estor, clearly showing that his estate is not intended to continue er his death: Tud. L. C. R. P. (4th ed.), p. 347; the cases (all

on wills) are collected in Theobald on Wills, c. 34, iv A. 1 (7th ed. p. 417.

Limitation to heirs followed by words of distribution;

The rule applies if words of distribution, as "share and sha alike," are added to the limitation to the heirs : Tud. L. C. R. I (4th ed.), p. 349; Hawkins on Wills (3rd ed.), 225; the cases (a on wills) are collected in Theobald on Wills, c. 34, iv A. 3 (7th ed. p. 418.

or by words of limitation;

The rule applies if words of limitation, as "and their heirs," a added to the limitation to the heirs : see this discussed, Hawki on Wills (3rd ed.), 226.

Where in a marriage settlement the limitations were to th husband for life, remainder to the wife for life, remainder to th "heirs of the body of the wife and their heirs and assigns for ever, it was held that the wife took an estate tail, *Alpass* v. *Watki* (1800), 8 T. R. 516.

The cases on wills are collected in Theobald on Wills, c. 34, A. 2 (7th ed.), p. 418; Tud. L. C. R. P. (4th ed.), p. 348.

Devise of real estate to A and his issue male in succession, that every elder son and his issue male may be preferred to eve younger son and his issue male, and so that every such son tak an estate for his life with remainder to his first and every subs quent son successively according to seniority in tail male, and failure of such issue over. *Held*, that A was entitled to an esta in tail male in possession : *Re Simcoe*, [1913] 1 Ch. 552; L. J. Ch. 270. Swinfen Eady, J., applied the rule in *Shelley Case* relying on the principle that it was a rule of law and not construction (see *Van Grutten* v. *Foxwell* (*supra*, p. 355), p. 684, but see the criticism of Sargant, J., on this point in *Hobbs* (*supra*, p. 357), at p. 592). See *Re Lord Lawrence*, [191 1 Ch. 129; 84 L. J. Ch. 273; *Re Elton*, [1917] 2 Ch. 413; L. J. Ch. 49.

or by words of both distribution and limitation.

The rule applies if words both of distribution and of limitati are added to the limitation to the heirs : Tud. L. C. R. P. (4th ed p. 351; Theobald on Wills, c. 34, iv. A 4 (7th ed.), p. 419. T question what words of explanation added to the word "heirs" w render the heirs purchasers is discussed in *Hawkins on Wi* (3rd ed.), 228; Theobald on Wills, c. 34, iv. A (7th ed.), p. 41

The rule held not to apply where a testator devised real esta in trust for W for his life, and afterwards in trust "for his heir-a law absolutely." The word "absolutely" superadded to the wo "heir-at-law" defines the estate which the heir is to take and h the same effect as if words of limitation had been used. The h becomes a new stock of descent and takes by purchase : *Re Huss and Green's Contract*, [1921] 1 Ch. 566; 90 L. J. Ch. 253.

Deeds and wills.

In *Re White and Hindle's Contract* (1877), 7 Ch. D. 2

alins, V.-C., held that there is no difference between deeds and lls as to the application of the rule in *Shelley's Case*.

Where a testator devised (*inter alia*) certain copyholds (as to hich there was no special custom of descent) to G B for life with-it impeachment of waste, and after his death to the "heir-at-w" of the said G B. *Held*, that the use of the expression "heir-law" did not exclude the operation of the rule: *Re Hack*, 925] 1 Ch. 633; 94 L. J. Ch. 343.

Remainder contingent.

The rule applies though the remainder be contingent: Co. Litt. 8 b; 1 Prest. Est. 316.

Executory or conditional limitation to the heirs.

The rule does not apply where the limitation to the heirs is not way of remainder, but is by way of executory or conditional nitation of a future use: 1 Fearne, C. R. 276; 1 Prest. Est. 323; *chardson* v. *Harrison* (1885), 16 Q. B. D. 85; 55 L. J. Q. B. 58. here is a *dictum* to the contrary by Malins, V.-C., in *Re White d Hindle's Contract* (1877), 7 Ch. D. 201, but see the criticisms that case in Challis, R. P. (3rd ed.), pp. 165-6.

Executory instruments.

The rule does not apply to executory instruments: *White* v. *ornburgh* (1715), 2 Vern. 702; Prec. in Chan. 425; Gilb. Eq. Rep. 7; 2 Eq. Ca. Ab. 714, pl. 2; *Trevor* v. *Trevor* (1720), 1 P. Wms. 2; 1 Eq. Ca. Ab. 387, p. 7; 2 Eq. Ca. Ab. 505, pl. 1; 5 Bro. C. 122; *Papillon* v. *Voice* (1728), 2 P. Wms. 471; W. Kel. 27.

"Heirs of the body," meaning children.

The context may show that the words "heirs of the body" ean "children," and then they will be words of purchase, notwith-nding that the parent takes a prior estate of freehold.

Limitations to E for life, remainder to the first son of E in tail ale, with like remainders to the second, third, and fourth sons in l male, "and so severally and respectively to each of the heirs ale of the body of E, and the heirs males of their bodies," nainder over. *Held*, that E took an estate for life only, with nainder to his sons successively in tail male: *Lisle* v. *Gray* 679), T. Raym. 278, 302, 315; T. Jones, 114; 2 Lev. 223. It stated by Tracey, J., who had searched the record (1 P. Wms.), by Lord Hardwicke (1 Ves. Sen. 147), and by Lord Mansfield Burr. 1109), that the statement that *Lisle* v. *Gray* had been versed is erroneous.

By a marriage settlement lands were limited to the use of the sband and wife successively for life, with remainder to the use the heirs of the body of the husband on the body of the wife d their heirs, and if more children than one, equally to be vided between them as tenants in common, and for default of ch issue, over. *Held*, that the children took by purchase as nants in common in fee: *North* v. *Martin* (1833), 6 Sim. 266; R. R. 113.

On marriage the husband executed a deed poll whereby he

settled all his real and personal estate "upon the said (intende wife) in case she survive me, and upon the heirs of her body by m lawfully to be begotten, obliging her to pay to each of her childre by me begotten as aforesaid, so soon as he, she, or they attain th age of twenty-one years, the sum of £1,000, and the remainder all I die possessed of equally at her death to divide among h children by me begotten as aforesaid." *Held*, that the childre took as tenants in common in fee : *Lowther* v. *The Earl of Wes moreland* (1784), 1 Cox, 64. (But this seems to have bee considered as a case of executory limitation, see p. 67.)

Trusts of freeholds and leaseholds declared for H. for life, an afterwards for the heirs of her body, and of J. and M. their heir etc. *Held*, that H. took for life only and that the heirs of th body were purchasers : *Withers* v. *Algood* (1735), cited *Bagshaw* v *Spencer* (1748), 1 Ves. Sen. 142, at p. 150. See *Re Davison Settlement*, [1913] 2 Ch. 498; 83 L. J. Ch. 148.

The rule in *Shelley's Case* does not apply where the word use is "heir" or "heir of the body" in the singular. But in a w a devise to A "and his male heir for ever," *Held* that the ru applied and that A took an estate tail : *Silcocks* v. *Silcocks*, [1916 2 Ch. 161; 85 L. J. Ch. 464.

It follows that—

Limitation to A for life; remainder to his heir or heir of his body.

Under a limitation to A for life, with remainde to his "heir" or to the "heir of his body," A takes for life only, with a contingent remainder fo life to his heir, or to the heir of his body : *Chambe* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J Ch. 193; 45 R. R. 94.

Remainder to heir of his body and the heirs, or heirs of the body, of such heir.

Under a limitation to A for life, with remainde to the heir of his body, and the heirs, or heirs o the body, of such heir, A takes for life only, wit a contingent remainder in fee or tail to the heir o his body : *Archer's Case* (1597), 1 Rep. 66 b; *S. C sub nom. Baldwin* v. *Smith*, Cro. Eliz. 453. Se *Re Hussey and Green's Contract*, p. 358, *supr*

New Law.

Section 130, sub-section 2 of the Law of Property Act, 192 seems to govern the conditions emerging from the preceding rul The section runs : "Expressions contained in an instrument comi into operation after the commencement of this Act, which, in will, or executory instrument coming into operation before su commencement, would have created an entailed interest in freeho land, *but would not have been effectual for that purpose in a de not being an executory instrument*, shall (save as provided by t

xt succeeding section) operate in equity, in regard to property l or personal, to create absolute, fee simple or other interests responding to those which, if the property affected had been sonal estate, would have been created therein by similar expres- ns before the commencement of this Act."

New Law.

Section 131 has been referred to on p. 355 (*supra*).

Limitation to A for life, remainder to his first son and the heirs le of his body, and so to his six sons, remainder to the heir male A to be begotten after the sixth son and of his heirs male. *ld*, that the last remainder was only a contingent estate in the , and not tail in A : *Waker* v. *Snowe* (1622), Palm. 359.

In a marriage settlement, after trusts for life for the husband l wife, there were trusts in remainder for the heir male of her dy by him to be begotten and his heirs male, and for want of h, trusts for the daughters, and if there should be no issue of marriage, in trust for the right heirs of the husband. The first nainder was held to be a contingent remainder in fee to such son as should be heir male of the body of the wife at her death : *yley* v. *Morris* (1799), 4 Ves. 788.

A limitation to A for life, with an ultimate limitation to the use f such person or persons as at the decease of the said A shall his heir or heirs-at-law and of the heirs and assigns of such person persons" vests a life estate in A with a contingent remainder fee to the person or persons who at A's death answer the cription of his heir or co-heirs : *Evans* v. *Evans*, [1892] 2 173; 61 L. J. Ch. 456. See *Re Davison's Settlement* (*supra*).

"Heir" in the singular construed "heirs."

But "heir" in the singular may be explained to mean "heirs" the plural, so as to be a word of limitation instead of purchase. Feoffment to the use of the grantor for life, remainder to the of B for life, remainder to the use of the heir or heirs of the body the grantor, and to the use of the heir of such heir or heirs *usum haeredis vel haeredum de son corps demesne et ad usum redis talis haeredis vel haeredum*), and if he died without issue nainder over. *Held*, that the heir took by descent, for though eir" is a word of purchase, yet "heirs" explains it, and makes in by descent of an estate tail : *Bony* v. *Taylor* (1614), 2 l. Abr. 253, H. pl. 3; 16 Viner, 213, Parols, H. pl. 3.

Equitable limitations, and grants of equitable interests.

An equitable limitation by way of trust executed, as distinguished from an executory trust, has the same construction as a legal limitation, and a grant of an equitable interest has the same construction as a grant of a legal interest.

Preston, Estates, vol. 2, p. 64; Hayes, Conveyancing (5th ed.), 1, c. 3, pp. 91 and 92; Lewin on Trusts (12th ed.), c. 8,

s. 1 (2), p. 125; Williams' Real Property (24th ed.), Pt. I, c. s. 5, p. 72. And it makes no difference whether such limitatio are contained in deeds creating or deeds conveying such equitab interests. The distinction between executed trusts and executo trusts is stated, and the cases collected, *infra*, Chapter on Exec tory Trusts. "But where the trusts and limitations are alread expressly declared the Court has no authority to interfere and mal them different from what they would be at law," *per* Lo Northington, L.K., *Austen* v. *Taylor* (1759), 1 Ed. 361, at p. 36 Ambl. 376, at p. 378 (a case on a will).

New Law. This rule would appear to be, if anything, of even strong application under the new legislation, for as in conveyances freehold land executed after 1925 words of limitation are unnece sary, *a fortiori*, equitable limitations do not require such word

"The trust is the estate at law in this Court (of Chancery) a governed by the same rules in general as all real property is limitation": *per* Lord Mansfield, C.J., *Burgess* v. *Wheate* (175 1 Ed. 177, at p. 224.

By the marriage settlement of a widow having children, re estate was conveyed by her to a trustee in fee, upon trust for h separate use for life, with remainder in trust for her children tenants in common, without any words of limitation. *Held*, th the children took estates for life only: *Holliday* v. *Overton* (185 14 Beav. 467; 15 Beav. 480; 16 Jur. 751.

Realty conveyed by marriage settlement to the use of truste and their heirs upon trust for the wife and husband successive for life, and afterwards for the children, and in default as the w should appoint, and in default for her next-of-kin, without a words of limitation. There were no children, and the wife ma no appointment. *Held*, that the next-of-kin took for life onl *Lucas* v. *Brandreth* (No. 2) (1860), 28 Beav. 274; 126 R. R. 13

Post-nuptial settlement vesting freeholds, copyholds, and lea holds in trustees in fee, upon trust to permit the settlor's wife receive the rents during the joint lives of herself and the settlor a during her widowhood, and afterwards upon trust to convey a divide such estate and premises amongst their children and t issue of their children who should then be living as tenants common, the issue of deceased children to take their paren shares. *Held*, that the children living at the time of division, a the children then living of those who were dead, took life esta only: *Tatham* v. *Vernon* (1861), 29 Beav. 604; 131 R. R. 727.

Voluntary settlement vesting freeholds in trustees in fee, up trust for the settlor for life, with remainder in trust for A as a when he should attain twenty-one, with interim powers of ma tenance. If A should die under twenty-one, or having attained t

should die in the lifetime of the settlor without leaving issue ng at the death of the settlor, a trust over. A attained twenty-, survived the settlor, and died leaving issue. *Held*, that A k for life only: *Middleton* v. *Barker* (1873), 29 L. T. s.) 643.

By a marriage settlement land was vested in trustees in fee ple, on certain trusts during the lives of the husband and wife, l subject thereto "on trust for all and every the children the marriage to be equally divided between or among them, more than one, in equal shares as tenants in common, but here shall be but one such child, then the whole to be in trust that one child, the shares of such children being a son or sons be conveyed or transferred to him or them or his or their resentatives, as and when he or they shall attain his or their pective ages of twenty-one years or die under that age leaving ful issue, and the shares of such of them as shall be a daughter daughters to be conveyed or transferred to her or them when and she or they shall attain the age of twenty-one years, or be sooner rried." *Held*, that the children took for life only: *Meyler* v. *yler* (1883), 11 L. R. Ir. 522.

Voluntary settlement of an equity of redemption by way of veyance to trustees and their heirs upon trusts for certain sons for life, and "then as to and concerning the heredita-nts and the rents and profits thereof," in trust for such child children of the settlor as being sons should attain twenty-one, being daughters should attain twenty-one or marry, "the e to be, if only one such child, paid, assigned, or transferred o him or her solely, or if two or more such entitled children, n to be paid, assigned, or transferred in equal shares as ants in common," the shares being paid, assigned, or trans-ed at twenty-one or marriage. *Held*, that the children took estates only: *Re Whiston's Settlement; Lovatt* v. *Williamson*, 94] 1 Ch. 661; 63 L. J. Ch. 273, followed in *Re Bostock*, [1921] h. 469; 91 L. J. Ch. 17. Contrast this with *Re Gillies' Settle-nt*, [1917] 2 Ch. 205; 86 L. J. Ch. 769; and see *Land Purchase stee* v. *Maclean*, [1926] N. Ir. 191.

"Estate and interest."

An assignment by A of all his estate and interest in certain real te devised by will to trustees, to a purchaser without words of itation. *Held*, to pass a life estate only: *Dearberg* v. *Letchford* 95), 72 L. T. 489; not followed in *Re Nutt's Settlement*, [1915] h. 431; 84 L. J. Ch. 877, where Neville, J., held that under an ointment without words of limitation of land and moneys ject to a trust for investment, there was a sufficient intention t the fee simple should pass. "I think that in the construction leeds dealing with equitable estates the Court should put such a

construction upon the covenant or grant as may be consistent wi the intention expressed in the whole deed" (at p. 436). See al *Re Monckton's Settlement*, [1913] 2 Ch. 636; 83 L. J. Ch. 34.

"Share." Assignment of the share to which A was entitled under will in the residuary estate of a testator and the investmen representing the same, to trustees, habendum unto the trustee their executors, administrators and assigns upon trusts: it havi been held that under the will there was no trust for conversion a that A was entitled to have conveyed to him a share of t testator's residuary real estate, it was held that an estate for t lives of the trustees and the life of the survivor of them on passed by the assignment: *Re Hudson* (1895), 72 L. T. 892.

Hereditaments in which the settlor had an equitable estate in f simple were conveyed unto trustees without words of limitatio It was held that an estate for their joint lives and the life of t survivor of them only passed by the deed: *Re Irwin*, [1904] 2 C 752; 73 L. J. Ch. 832. See *Re Monckton's Settlement*, [1913] Ch. 636; 83 L. J. Ch. 34; followed in *Re Nutt*, *supra*.

Certain hereditaments were vested in trustees in trust for t husband and wife successively, for life; on the death of the surviv the rents were to be paid in maintenance "of all and every the chi or children, until such child or children" should attain twenty-on "and when and as such child or children respectively should atta twenty-one upon trust to convey unto such child or children" the parents should appoint; in default "to convey all the sa premises unto and amongst such children equally"; and if but o such child, upon trust to convey to such only child, and his or h heirs for ever, with a gift over. *Held* (*inter alia*), that the limit tion in default of appointment gave a vested interest in fee to ea child on his birth: *Strutt* v. *Braithwaite* (1852), 5 De G. & S 369; 21 L. J. Ch. 609, in which Sir James Parker, V.-C., say "In a marriage settlement for the benefit of children a directi to convey must mean to convey to them in fee" (5 De G. & Sm *supra*, at p. 377).

Copyholds were settled in trust after the deaths of a woman a her husband, "for all the children of such marriage equally to divided between them as tenants in common, and in default of iss of such marriage, then to such uses as" the woman should by w appoint, with remainder to her right heirs; it was held by Joyce, J that the children of the marriage were entitled to equitable estat in fee simple on the ground that the settlor intended, as appear from the deed, to make a complete settlement of his whole estate the copyholds: *Re Tringham's Trusts; Tringham* v. *Greenh* [1904] 2 Ch. 487; 73 L. J. Ch. 693; followed in *Re Oliver's Sett ment*, [1905] 1 Ch. 191; 74 L. J. Ch. 62; see also *Re Cross's Trus*

15] 1 Ir. R. Ch. 304, and *Re Murphy and Griffin's Contract*, 19] 1 Ir. R. Ch. 187.

In *Re Gillies' Settlement* (*supra*, p. 363), Eve, J., decided that spite of the absence of express words of limitation equitable ates in fee simple passed to the children of the settlor. The e was not decided upon the presence or absence of any indica- n as to the settlor's intentions, but upon the ground that powers absolute appointment were interposed between the life interests the settlor and his wife and the ultimate trust in favour of the ldren in such a way as unquestionably to have authorised an ointment of the fee simple. *Re Tringham's Trusts* (*supra*), s for some time regarded as of doubtful authority. It was lained in *Re Thursby's Settlement; Grant* v. *Littledale*, [1910] h. 181; 79 L. J. Ch. 538; and finally overruled in *Re Bostock pra*, p. 363). "I have never decided and do not think that appointment of equitable interests in land to A or to a class hout words of limitation, or under the Conveyancing Act, can ry more than a life interest to the appointee": *per* Farwell, ., in *Re Thursby's Settlement* (*supra*), at p. 188.

Personalty.

The expressions "heirs" and "heirs of the body," are of course ot when used with reference to personal estate, but they are en to be found in deeds relating to personalty.

When this is the case—

Gift of personalty to A and his heirs.

A gift of personalty, either directly to, or by way of trust for, "A and his heirs," is a gift to A absolutely: Williams' Personal Property, pt. 3, c. 1, p. 447 (18th ed.).

Gift of personalty to heirs of A.

A gift of personalty, either directly to, or by way of trust for, the "heirs" of A, is a gift to the heir-at-law of A.

Substitutionary gift of personalty to heirs of A.

A gift of personalty, either directly to, or by way of trust for, the "heirs" of A in substitution for A, in the event of his death before the time of distribution, is a gift to the statutory next-of-kin of A.

New Law.

After 1925 a gift of personalty, either directly to, or by way of st for "A and his heirs" would, it seems, be a gift to A olutely.

A similar gift, either directly to, or by way of trust for the eirs of A" would, it is submitted, operate as a gift to the son who, under the general law in force before 1926, would

New Law. have answered the description of A's "heir." See section 13 Law of Property Act, 1925.

A similar gift, either directly or by way of trust for the "heirs of A, in substitution for A, in the event of his death before t time of distribution, would, perhaps, be a gift to the persons w take under an intestacy by virtue of Part IV of the Administrati of Estates Act, 1925.

The distinction between the two last preceding ru under the old law is well explained by Romilly, M.R., *Hamilton* v. *Mills* (1861), 29 Beav. 193; 131 R. R. 51 where the trusts of money were declared by deed for for life, afterwards for B, his wife, for life, afterwards f the children of the marriage, "and on failure of any child children of the marriage, then to the right heirs of the survivor A and B." Lord Romilly (at p. 197) said: "Nothing turns on t word '*heirs*' being in the plural instead of the singular number; th may be many as well as one. The question is, whether the wor 'right heirs' are to be treated as words of description or wor of substitution; it is something analogous to, but not the same a the case of a devise of real estate, where the question is wheth the word 'heirs' is a word of limitation or purchase. I cann say it is a word of limitation; nor is it what may be called word of substitution. If it creates a gift substituted on a failu of a prior gift, so that the real meaning of the words in the w amounts to this—that if the person who is the principal obje of the legacy should die and not be able to receive it, it is giv to his right heirs—it follows the devolution of personal estate. a legacy be given to A or his heirs, A, if he survives the testato will be entitled to the legacy; but if A die, the word 'heirs' introduced to prevent a lapse, and therefore the Court holds th if the first legatee does not take, the same person will take would have taken after him if there had been no lapse, and th the legacy follows the devolution of personal estate. But wh the words are descriptive and not substitutional, you must follo the obvious meaning of the word. Thus, if a person says, 'I gi a legacy to the heir male of A,' the heir takes the legacy, a A takes nothing. It is the same as if the testator said, 'I gi the person who is A's heir £1,000.' The only question is, which of these two classes of cases these words belong. . . all cases of substitution, the primary legatee, if he had surviv the testator, would have taken; but here there is no gift to t survivor, but the settlement expressly directs that on failure children it is to go 'to the right heirs of the survivor.' The is no principle on which these words can be considered as substitutional gift to the 'right heirs' of the survivor."

By a marriage settlement £500 was assigned to trustees, on st, with the consent of the wife, to lay out the same in land inheritance to be conveyed to the trustees and their heirs, trust, to pay the rents to her for life for her separate use, ainder to her husband for life, and after the death of the vivor, on trust to convey to such persons as the wife should oint, and in default of appointment, in trust for the heirs of wife: proviso, that, until the purchase, the trustees should est in the Funds, and pay the dividends to the wife for her for her separate use, and after her death, to the persons would be entitled to the rents of the land if purchased, and uld pay or transfer the principal sum of £500, or the stock chased, to such person "as according to the limitations afore- l might be entitled to the inheritance" of the land. There was issue of the marriage; the wife died and afterwards the husband d. *Held*, that on the death of the wife without having ointed, the £500, which had not been invested in land, and not to be considered as land even in equity, the direction for estment not being imperative, went to the personal repre- tative of the person who at the wife's death was her heir-at-law: *ssell* v. *Smythies* (1786), 1 Cox, 215.

A and B were co-heiresses to an estate; by post-nuptial settle- nt A's moiety was settled to the use of her husband C for life, ainder to the use of A for life, remainder to the use of B for remainder to trustees for a term of years. The trusts of the n were to raise £1,000 and to pay it (in default of exercise of a cial power, which was not exercised), "to the next heir or eirs" of B. A and her husband died in the lifetime of B. *d*, that the heirs-at-law of B were entitled on B's death to e the £1,000: *Morris* v. *Cantle* (1782), 6 Br. P. C. 418.

No case has been found where, under the trusts of a deed, the eirs" took by substitution. The cases on wills are collected in *ngfield* v. *Wingfield* (1878), 9 Ch. D. 658; 47 L. J. Ch. 768; see *Keay* v. *Boulton* (1884), 25 Ch. D. 212; 54 L. J. Ch. 48; obald on Wills, c. 31, "Bequests of Personalty to Heirs," (4), 34 (7th ed.); Jarman on Wills, c. 40, s. 5, p. 1570 (6th ed.).

Trust for A and the heirs of his body.

A gift of personalty, either directly to, or by way of trust for, "A and the heirs of his body," or for "A for life," with remainder, either mediate or immediate, to the "heirs of his body," is a gift to A absolutely.

New Law.

Section 130, sub-section 1 of the Law of Property Act, 1925, vides for the creation of estates tail in personalty. A gift of onalty after 1925, either directly to or by way of trust for "A

New Law.

and the heirs of his body" would appear to give A an equitab interest in tail general.

A similar gift to "A for life with remainder," either media or immediate, to the "heirs of his body" presents more difficult Section 131 of the Law of Property Act, 1925, seems to b inapplicable.

Chattels real or personal limited to A for life, remainder to the heirs of his body.

"Where there is an express limitation of a chattel by wor which if applied to a freehold would create an express estate ta the whole interest vests absolutely in the first taker": *p* Ashurst, J., *Doe* v. *Lyde* (1787), 1 T. R. 593, at p. 596 (a ca on a will); cf. 1 Fearne, C. R. 490 *et seq.*; 2 Fearne, C. R (10th ed.), ss. 593 *et seq.*

This rule is sometimes stated thus: "Expressions which, applied to real estate, would confer an estate tail, when applied personal property, simply give the absolute interest": s *Leventhorpe* v. *Ashbie* (1635), 1 Roll. Abr. 831, pl. 1; Tud. L. Real P. 382 (4th ed.) (a case on a will).

Examples.

Term assigned by marriage settlement to trustees on trust permit T, the intended husband, to enjoy the same so long as should live, with remainder on trust for A, the intended wife, f life, and after the decease of T and A to permit the heirs of t bodies of T and A to hold the premises during the remainder the term. *Held*, that the whole term vested in T: *Webb* v. *Wel* (1710), 2 Vern. 668; 1 P. Wms. 132.

To the same effect are *Tatton* v. *Mollineux* (1610), Moore, 80 *Hunt* v. *Baker* (1680), 2 Freem. 62; *Theebridge* v. *Kilbur* (1751), 2 Ves. Sen. 233. Consider *Re Whitty*, Ir. R. 9 Eq. 4 The cases on wills are collected, Hawkins (3rd ed.), 230; Jarm on Wills, c. 33, p. 1193 (6th ed.).

The rule has also been applied where the words were to perm and suffer A to receive the rents, etc., *for so many years of t term as should expire in his lifetime*, and after his decease trust to permit B, A's wife, to receive the rents during h life, and after the several deceases of A and B to permit t heirs of the body of A to receive the rents for so many years the term as should expire in the life or lives of him, her, them respectively: *Bartlett* v. *Green* (1842), 13 Sim. 218; L. J. Ch. 148.

Gift over on failure of issue.

The rule is not affected by a gift over on general failure of iss of the propositus: *Theebridge* v. *Kilburne* (1751), 2 Ves. Sen. 23 *Bartlett* v. *Green* (1842), 13 Sim. 218; 12 L. J. Ch. 148.

"Heir" in singular.

The rule seems to apply where the word is "heir" in t singular: *Le Rousseau* v. *Rede* (1761), 2 Ed. 1, the Lord Chancel Northington saying that the word must be construed as "heirs see p. 6.

Exceptions.

"Heirs of the body," their executors.

'here are exceptions to this rule :—

'irst. Where there are words of limitation to the executors ıe heirs of the body, the latter take by purchase : *Hodgson* v. *sy* (1740), Barn. Ch. Rep. 195; 2 Atk. 89, cited as *Hodsel Sussy* in *Garth* v. *Baldwin* (1755), 2 Ves. Sen. 646, at pp. 652,

Executory trusts.

'econd. Where there is an executory trust for the heirs of the *y* : see *infra*, Chapter on Executory Trusts.

"Heirs of the body" construed by context.

'hird. The context may show that "heirs of the body" are ls of purchase : *Withers* v. *Algood* (1735), cited in *Bagshaw* v. *ıcer* (1748), 1 Ves. Sen. 142, at p. 150, where the words were A for life, and afterwards to the heirs of her body, and of d M, their heirs, etc."

Heirs of the wife's body taking husband's property.

'ourth. Apparently where the trusts are contained in a 'iage settlement, and the property is the husband's, and the are to proceed from the body of the wife, the heirs take as hasers.

'here by a marriage settlement, a term belonging to the and was assigned to trustees on trust "to permit and suffer husband and wife, and the survivor of them, to receive the ts for so many years of the term as they or the survivor of should happen to live, and after their deaths to the use of the of the body of the wife by the husband to be begotten." *Held*, the "heirs of the body" took by purchase, it being considered ıalogous to the case of a wife tenant in tail, *ex provisione viri* r 11 Hen. 7 (1495), c. 20; *Peacock* v. *Spooner* (1690), 2 Vern. Freem. Ch. Rep. 114; and cited in *Webb* v. *Webb* (1710), 1 P. . 134. This case was followed in *Dafforne* v. *Goodman* (1699), rn. 362; *S. C. sub nom. Daffern* v. *Bolt*, Prec. Ch. 96; Freem. Rep. 228, 231. These cases are discussed, Fearne, C. R. 493; ıe's Posth. Works, 388 *et seq.* *Peacock* v. *Spooner* was a ion of lay peers in the House of Lords against the opinion of ıajority of the Judges, and Fearne (1 Cont. Rem. (10th ed.), 3) thinks it "is only attended to in cases exactly the same in e with itself."

Where ancestor take a term of years only.

'fth. It has been held in one case that where the trust for the tor was for "ninety-nine years if he should so long live," the en took by purchase : *Ward* v. *Bradley* (1687), 2 Vern. 23, in *Webb* v. *Webb* (1710), 1 P. Wms. 132, at p. 134.

"Heirs" meaning children.

xth. The context may show that by "heirs" is meant en. See *supra*, p. 359.

Trust in remainder for

A gift of personalty either directly to, or by way of trust for, the "heirs of the body," in remainder

heirs of the body.

after the death of the ancestor, vests in such of t statutory next-of-kin as descend from him.

The rule above quoted has reference to a case where t ancestor had no transmissive interest, and the persons designat " heirs of the body " took as purchasers.

Example.

In *Ward* v. *Bradley* (1687), 2 Vern. 23, where the trusts of p sonalty were for A for ninety-nine years if he lived so long, th for his wife for life, remainder for the heirs of A begotten on wife; it was held, that on the death of A, the children who s vived him took equally. It will be observed that the decision *Ward* v. *Bradley* does not show that a child in order to take m survive the propositus; but the reasoning in *Re Jeaffreson's Tru* (1866), L. R. 2 Eq. 276; 35 L. J. Ch. 622 (a case on a will), see to show that the rule as above laid down is correct.

Substitutionary gift of personalty to heirs of body.

No case has been found where under a deed the " heirs of t body " took by substitution, but probably the statutory next-of-k who descended from the original taker would be held to entitled. After 1925, probably the persons who would be entitl would be found by reference to Part IV of the Administration Estates Act, 1925.

CHAPTER XVII.

DEATH WITHOUT ISSUE.

ıth without Issue: Limitation to A and his Heirs, followed by a Limitation over on Death "without Issue," or, "without Heirs of his Body": Limitation over "in Default of such Issue," or, "without leaving Issue": Limitation over on Death before the happening of a Certain Event, "or" without Issue: Limitation to Children with Limitation over "in Default of such Issue."

In many deeds limitations are to be found to A for life with ıainder to his issue, or to A in fee, followed by a limitation over A's death without issue, and such limitation over in many cases cts the construction of the prior limitations.

In the absence of any context the words "die without issue," or "die without issue male," are construed to mean the failure of the issue, or of the issue male, of the propositus at any time, either before, at, or after his death.

"Death without issue," means general failure of issue.

" Until he die without issue and as long as he shall have issue terms synonymous in my opinion," *per* Montague, C.B., *Duke Norfolk's Case* (1681), 3 Ch. Ca. 1, at p. 17.

Examples.

Limitation of a term to raise portions, "if A should die without e male"; A died leaving a son and a daughter, then the son without issue. *Held*, that the limitation on "the death of A, ıout issue male" thereupon took effect: *Goodwin* v. *Clark* 2), 1 Lev. 35; *S. C. sub nom. Goodiar* v. *Clarke*, 1 Sidf. 102, re the words are said to be "if he die without heir male is body"; *sub nom. Goodier* v. *Clerke*, 1 Keb. 73, 78, 169, 462, where the case is stated somewhat differently: stated Holt, C.J., in *Andrews* v. *Stroud* (1706), Holt, 623, at pp. 624, Cp. *Re Colles's Estate*, [1918] 1 Ir. R. 1.

'he rule does not apply where the limitation over is on death out issue at a certain age: *Right* v. *Day* (1812), 16 East, 14 R. R. 294 (a will case); nor to a covenant to repay on h without issue within a certain period: *Brett* v. *Pildredge*

(1637), cited in *Goodiar* v. *Clarke* (1663), Sidf. 102; and *S.* *sub nom. Bret* v. *Bridman*, cited in *Goodier* v. *Clerke* (166 1 Keb. 462.

Context.

The context may show that death "without issue" me "without leaving children," see *infra*, Chapter on Marriage, et or "without leaving issue living at A's death." The cases all which arise on wills, are collected: Hawkins (3rd ed.), p. 2 Jarman on Wills, c. 52, p. 1958 (6th ed.); Theobald on Wi c. 51, p. 708 (7th ed.).

Limitation to A and his heirs with a limitation over on his death without issue.

A limitation "to A and his heirs," followed a limitation over if A dies "without issue," "without heirs of his body," confers an estate t on A: see *per* Wright, L.K., note to *Bamfield* *Popham* (1702), 1 P. Wms. 54, at p. 57.

New Law.

In the creation of an entailed interest those expressions o which prior to 1926 were effectual in a deed (not being an execut instrument) to create an estate tail in freehold land may be use section 130, sub-section 1 of the Law of Property Act, 1925.

"If lands be given to B and his heirs, to have and to hold to and his heirs, if B have heirs of his body, and if he die with heirs of his body, that it shall revert to the donor, this is adjud an estate tail and the reversion in the donor": Co. Litt. 21 a.

Examples.

Limitation to the use of A and B, his wife for life and to heirs of A after the death of A and B, and if it shall happen t A shall die without issue of his body, remainder over. *He* tail in A; *Canon's Case* (1558), 3 Leon. 5, pl. 13.

Feoffment by B, to the use of himself for life, remainder to use of J for life, remainder to the use of the first son begotten the body of J that shall have heirs male of his body and to heirs for ever, and in default of such issue of his body, to the of the first daughter and daughters of J, which shall have issue her body, and in default of such issue remainder to the right h of J. *Held*, that the limitation to the first son of J was contingent estate tail in him: *Beck's Case*, *alias Burton* v. *Nich* (1630), Litt. Rep. 159, 253, 285, 315, 344. The report of this c *sub nom. Boreton* v. *Nicholls*, Cro. Car. 363, is very imperfect.

Limitation to the use of A for life, remainder "to the use of son Thomas and his heirs for ever, and for default of issue of body of the son," to the use of the heirs of A. *Held*, tail in son: *Leigh* or *Lee* v. *Brace* (1696), 5 Mod. 266; Carth. 343; 1 Raym. 101; 3 Salk. 337; Holt, 668; 12 Mod. 101. There is so discrepancy in the reports of this case, but it is correctly stated

text. See *per* Willes, C.J., in *Tapner* v. *Merlott* (1739), es, 177, at p. 181.

Limitation to the use of A for life, remainder to the use of his st son and the heirs male of such eldest son, the elder always e preferred before the younger, and in case of failure of the male of the eldest son, remainder over. *Semble*, the eldest took an estate tail : *Smith* v. *Smith* (1855), 5 Ir. C. R. 88.

Conveyance to the use of the settlor for life, remainder to the of D, his heirs and assigns, but if D should die without issue, he use of T, his heirs and assigns, but if both D and T should without issue, to the use of the male issue of the settlor. D l without issue. *Held*, that T took an estate tail : *Morgan* v. *gan* (1870), L. R. 10 Eq. 99; 39 L. J. Ch. 493.

Estate for life not enlarged by limitation over on death without issue.

It is perhaps necessary to say that an express estate for life will be enlarged by a gift over in default of issue of the tenant for : *Seagood* v. *Hone* (1634), Cro. Car. 366; Sir Wm. Jones, 342.

Limitation over in default of *such* issue, or without *leaving* issue does not cut down fee.

New Law.

An estate in fee simple is not cut down to an estate tail by a limitation over "in default of *such* issue," or, "without *leaving* issue."

As to words necessary to create an entailed interest, see last ceding rule, and for entailed interests by implication, see pter XVI, p. 341.

Thus "for default of such issue" : *Idle* v. *Cook* (1705), 2 Ld. m. 1144; 2 Salk. 620; 1 P. Wms. 70; 11 Mod. 57; Holt, 164; r want of such" : *Bayley* v. *Morris* (1799), 4 Ves. 788; "with- leaving issue" : *Olivant* v. *Wright* (1878), 9 Ch. D. 646; do not down an estate in fee simple. See also *Arthur* v. *Walker*, 97] 1 Ir. R. Ch. 68.

Limitation over in default of "such issue" proceeding from specified body does cut down fee.

But if the context show that the issue is to proceed from a ified body, the fee simple is cut down to an estate tail.

Limitation to the use of the first son who shall have issue male *is body* and to his heirs, and for default of such issue over. *l*, tail in the son : *Beck's Case, alias Burton* v. *Nichols* (1630), . Rep. 159, 253, 285, 315, 344; *S. C. sub nom. Boreton* v. *olls*, Cro. Car. 363.

n *Beresford's Case* (1607), 7 Rep. 41 a, a limitation in ainder "to the use of A and of the heirs male of the said A *ully begotten*, and for default of such issue," over, was held, on construction of the whole deed, to give to A an estate in tail . Willes, C.J., says (*Goodright* v. *Goodridge* (1742), Willes, at p. 374), that this case "can hardly be cited as an authority, ss a deed of uses should happen to be penned exactly in the words."

In *Shelley* v. *Earsfield* (1662), 1 Rep. in Ch. 206, where t limitations were, to the use of A for life, remainder to the use the heirs of A *lawfully begotten*, and for want of such iss remainder (subject to some prior limitations) to the use of B (brother) for ninety-nine years if he should so long live; it v held that A took in tail. No reasons were given for the decisi which probably turned on the rule that a limitation over failure of issue to a person who can be heir cuts down the origi limitation to an estate tail.

Personalty.

In a marriage settlement a leasehold estate was settled in tr for husband and wife for life; after the decease of the survivor t trustees were to assign it with the rents and profits to the eld son, "for want of such issue of such son" to the daughters. T only son died without issue in the mother's life. *Held*, that surviving daughter took the estate: *Exel* v. *Wallace* (1751), Ves Sen. 117, and, on appeal, 318. It will be noticed that it v an executory trust and the words were very peculiar.

"Or" without issue read "and."

In a limitation to A in fee simple, or to A for life with remain to his issue, with a gift over on his death before the happening o certain event, *or* without issue, "*or*" will be construed "*and*."

Surrender of copyholds to the use of S for life, remainder to t use of his wife E during widowhood, remainder to the use of for life, remainder to the use of the issue of his body; with proviso that if W should die in the lifetime of S *or* without iss of his body, then the surrendered premises should go over. *He* that "*or*" must be read "*and*," and that the gift over would o take effect if W died in the lifetime of S without issue: *Wright Kemp* (1789), 3 T. R. 470; 1 R. R. 748; cp. *Right* v. *Day* (181 16 East, 67; 14 R. R. 294.

The corresponding rule as to wills is stated and discuss Jarman on Wills, c. 18, p. 601 (6th ed.); Hawkins (3rd e p. 252; Theobald on Wills, c. 50, p. 703 (7th ed.).

Limitation to children not enlarged by limitation over in default of such issue.

A limitation to a child, or to children generally, will not enlarged to an estate tail in such child or children merely b limitation over "in default of such issue."

Remainder in a settlement, after successive estates tail in sons, "to the use of all and every the daughters of the body the said A on his said wife to be begotten as tenants in comm and not as joint tenants, and for default of such issue, to the ri heirs of A." It was admitted without argument that the daught took for life only: *Snell* v. *Silcock* (1800), 5 Ves. 469; *Chamb* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. Ch. 193; 45 R. R.

CHAPTER XVIII.

ESTATES FOR LIFE—SEPARATE ESTATE—RESTRAINT ON ANTICIPATION—ESTATES PUR AUTRE VIE.

nitations of Estates for Life: Estate not enlarged by direction to pay Money; or because Trustees take a Fee: Indefinite Trust of Income of Personalty is Trust of Capital: Determinable Life Estate: Life Estate till Separation: Life Estate until Alienation: Until Bankruptcy: Separate Use of Married Woman: Words creating Separate Use: Separate Use of Remainder: How far revives on Remarriage: Restraint on Anticipation of Property given for Separate Use: Words creating Restraint: Restraint on Remainder: Restraint Revives on Remarriage: Estates pur autre vie: No Words of Limitation necessary to Create or Convey: Devolution on Death Determined by Words of Limitation: Heir takes as Special Occupant: How Executors take: Devolution can be Changed: No Words of Limitation necessary for Equitable Interests: Settlements of Estates pur autre vie: Quasi Estates Tail in Estates pur autre vie: How far Barrable.

HAVING discussed in a previous chapter the construction of limi-ions where the word "heirs" occurs, it remains to consider the istruction of limitations which do not comprise the word "heirs."

Grant to A by owner in fee;

A grant by a man seised in fee simple of land to "A," or to "A and his assigns," or to "A and his issue," or to "A and his seed," or to "A for ever," or to "A for life," confers on A an estate for his own life: Litt. ss. 1 and 283; Co. Litt. 42 a; Shep. Touch. 105, 106, 107, 110; if the grantor be seised in tail or for life, A takes an estate for the life of the grantor: Co. Litt. 42 a; Shep. Touch. 105, 107, 110; and if the grantor be possessed of a term, A takes the whole term, unless the grant be to A for life expressly: Shep. Touch. 110.

in tail or for life;

or of term.

New Law.

But after 1925 no words of limitation are necessary in a convey-e of freehold land, and the grantee takes the fee simple or other

New Law.

the whole interest which the grantor had power to convey in su land, unless a contrary intention appears in the conveyanc section 60, sub-section 1, Law of Property Act, 1925.

Examples.

Life estates and entailed interests can only exist in equity.

Limitation in a marriage settlement, after successive estates t to the sons, to the daughters as tenants in common, and in defau of such issue, over; admitted without argument that the daughte took for life only : *Snell* v. *Silcock* (1800), 5 Ves. 469, at p. 472.

Limitation in a marriage settlement to the "heir female of t body" of the settlor. *Held*, his daughters took a life estat *Chambers* v. *Taylor* (1837), 2 My. & Cr. 376; 6 L. J. Ch. 19

Limitation to "next-of-kin." *Held*, they took a life estat *Lucas* v. *Brandreth* (No. 2) (1860), 28 Beav. 274.

"Heir."

The addition of the word "heir," or "heir of the body," do not enlarge the estate : Co. Litt. 8 b; *supra*, Chapter on Limitatio to Heirs.

"Executors."

The addition of the word "executors" does not enlarge t estate. "A limitation extending a grant to the *executors*, will n in any deed enlarge the estate; the estate will be of the sa quantity, notwithstanding the executors are named, as it wou have been in case no mention had been made of them" : 1 Presto Estates, 30; *Re Bird* (1876), 3 Ch. D. 214; but see *infra*, p. 38 as to conveyances of estates *pur autre vie*.

Right to occupy for life.

A right to occupy for life gives a life estate : *R.* v. *T Inhabitants of Eatington* (1791), 4 T. R. 177.

Option to have a lease.

An option to have a lease is, *semble*, a lease for life : see *di* of Kennedy, J., in *Austin* v. *Newham*, [1906] 2 K. B. 167, p. 170; 75 L. J. K. B., at p. 564, and of Bramwell, J., in *Ku* v. *Watson* (1879), 11 Ch. D. 129, at p. 135; 48 L. J. Ch., at p. 4

Direction that grantee shall pay money.

A direction that A shall pay a sum of money does not enla the estate : *Wright* v. *Dowley* (1778), 2 Wm. Bl. 1185.

Legal fee limited to trustees.

The fact that the legal estate is limited to trustees in fee d not enlarge the estate : *supra*, Chapter on Limitations to Heirs.

The above rules apply only to real estate; it is otherwise w regard to personalty, for—

Trust of income for unlimited period carries the capital.

A trust of income of personalty for an unlimit period carries the capital.

"Supposing an absolute owner of personal property to give income of his property to a person, what does that person tak He has a right to receive the income for ever, and having the ri to the whole income he has the right to dispose of the capi which produces that income" : *per* North, J., *Re L'Hermin* [1894] 1 Ch. 675, at p. 676; 63 L. J. Ch. 490.

Trust in a marriage settlement to stand possessed of the income he trust funds for such persons as the wife should appoint, and ject to such appointment of the income, to stand possessed of trust funds and the income thereof upon certain trusts therein lared. *Held*, that the wife had a power to appoint the capital he trust funds : *Re L'Herminier* (*supra*).

A life estate may be made determinable on an event during life.

Estates for life determinable.

"If a man grant an estate to a woman *dum sola fuit* or *durante uitate*, or *quamdiu se bene gesserit*, or to a man and a woman ing the coverture, or as long as the grantee dwell in such a se, or so long as he pay £10, etc., or until the grantee be moted to a benefice, or for any like incertaine time . . . in all se cases, if it be of lands or tenements the lessee hath in gment of law an estate for life determinable, if livery be made : l if it be of rents, advowsons, or any other thing that lie in nt he hath a like estate for life by the delivery of the deed" : Litt. 42 a; Shep. Touch. 105, 106; 2 Blakst. Com. 121.

Lease till a certain sum be paid.

If a lease be made of land to A, without words of limitation, a certain sum be paid, "in this case, because the annual profits uncertain, he hath an estate for life, if livery be made, deter- nable upon the levying of" the sum : Co. Litt. 42 a; *Manning's e* (1609), 8 Rep. 94 b at p. 95 b. But, formerly, it was but an ate at will without feoffment, for it is not certain that the land ll be every year of the same annual value : *Bishop of Bath's e* (1605), 6 Rep. 34 b, at p. 35 b.

Grant of rent till certain sum be paid.

"If a man grant a rent of £20 per annum till £100 be paid, re he hath an estate for five years, for there it is certain and ends upon no uncertainty" : Co. Litt. 42 a.

How far a gift over on separation is good.

A condition in a marriage settlement that, "in case a separation ll take place," rents, which were by the trusts of the settlement able to the wife during her life, should thenceforth during the t lives of husband and wife be paid to the husband, was held in *Cartwright* v. *Cartwright* (1853), 3 D. M. & G. 982; 22 L. J. 841; 98 R. R. 405; and a limitation over in a marriage settle- nt upon the separation of husband and wife was held void in v. *W.* (1857), 3 K. & J. 382; 112 R. R. 196 (where the trusts e to pay certain income during the joint lives of husband and "if she should so long continue to live with him and should not separate and apart from him through any fault of her own," to and after the decease of either of them, "or in the event of" wife "living separate and apart from the husband through such fault as aforesaid, thereupon and immediately after the

happening of such an event upon trust " for the survivor in case death, or the husband in case of separation, for his or her life); b a trust by way of limitation in a post-nuptial settlement of rents a woman for life or " so long as she shall continue the cohabiti wife or the widow " of the settlor, and " from and after the dissol tion of their marriage or judicial separation between them " for t settlor, was held good, and to determine on her ceasing to live wi her husband, in *Re Hope Johnstone*, [1904] 1 Ch. 470; 73 L. K. B. 321.

Life estates may be given over on alienation,

A life interest can be limited until, or give over upon, alienation.

Property may be limited to a tenant for life until alienatio voluntary or involuntary, otherwise than by bankruptcy, even the property be the property of the tenant for life himself, a the interest thus limited determines on alienation: *Brooke Pearson* (1859), 27 Beav. 181; 122 R. R. 364; *Knight* v. *Brow* (1860), 9 W. R. 515; 30 L. J. Ch. 649; 126 R. R. 832; *Hammo* v. *Barrett* (1869), 21 L. T. 321 (this case is explained Stirling, J., *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505, at p. 513 *Re Detmold* (1889), 40 Ch. D. 585; 58 L. J. Ch. 595; *Doherty*

or bankruptcy,

Power, [1916] 1 Ir. R. Ch. 237; and property may be limited a tenant for life until bankruptcy by persons other than himse and the interest thus limited determines on bankruptcy: *Ex Hinton* (1808), 14 Ves. 598; *Re Ashby, ex p. Wreford*, [189 1 Q. B. 872; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; 64 L. J. C 274; *Re Stephenson, ex p. Brown*, [1897] 1 Q. B. 638; 66 L.

unless settlor's own property.

Q. B. 423; but such a limitation of the settlor's own property do not determine on bankruptcy, but so far as is necessary for t payment of his creditors is deemed a life estate: *Higinbotham Holme* (1812), 19 Ves. 88; 12 R. R. 146; *Wilson* v. *Greenwo* (1818), 1 Swans. 471, at p. 481; 18 R. R. 118; *Lester* v. *Garla* (1832), 5 Sim. 205; 1 L. J. Ch. 185; 35 R. R. 146; *Ex p. Bar* (1884), 26 Ch. D. 510, at p. 519; 53 L. J. Ch. 802; *Re Mo* (1886), 17 Q. B. D. 275; *Re Brewer*, [1896] 2 Ch. 503; 65 L. J. C 821; *Merry* v. *Pownall*, [1898] 1 Ch. 306; 67 L. J. Ch. 16 which vests indefeasibly in his trustee in bankruptcy, who c make a good title to the income of the settled property duri the remainder of the settlor's life, unaffected by any subseque act of forfeiture by him: *Re Burroughs-Fowler*, [1916] 2 C 251; 85 L. J. Ch. 550; but if the whole property is not requir for his creditors the limitation *qua* the bankrupt ceases on bankruptcy: *Re Johnson Johnson, ex p. Matthews*, [1904] 1 K. 134; 73 L. J. K. B. 220.

Such a limitation, moreover, even of the settlor's own property, be upheld to the extent to which another may be deemed to e purchased such property.

Settlor's own property may be given over so far as purchased by others.

"There have been many decisions as to the application of this nciple to marriage settlements, and it has been long established t if husband and wife both bring property into such a settlement rust of the income of the wife's property in favour of the husband il his bankruptcy is good, while a similar trust of the income of husband's property is bad": [*i.e.*, that the clause of cesser gift over, is inoperative] "see *Lockyer* v. *Savage* (1732), tra. 947; *Higinbotham* v. *Holme* (*supra*). If, however, the e's fortune is not brought into settlement, but is paid over to the band, then it has been held that a trust of the income of the band's own property in favour of himself until bankruptcy is d to the extent of the wife's fortune received by him: *Ex p. ke* (1803), 8 Ves. 353; 7 R. R. 68; *Ex p. Hodgson* (1812), 19 s. 206; 12 R. R. 171; *Re Meagham* (1803), 1 Sch. & Lef. 179; gginson v. *Kelly* (1810), 1 Ball & Beat. 252; 12 R. R. 28; *Lester Garland* (1832), 5 Sim. 205"; and *per* Wood, V.-C., *Whitmore* v. son (1861), 2 J. & H. 204, at p. 214; 31 L. J. Ch. 433, at p. 435; R. R. 190; *per* Stirling, J., *Mackintosh* v. *Pogose*, [1895] 1 Ch. , at p. 511; 64 L. J. Ch. 274.

Where under a settlement a husband had a protected life erest in the wife's settled funds, subject to the payment of £150 annum to the wife, the release of his life interest in sums vanced for the benefit of children of the marriage was held to constitute a forfeiture of such life interest under the tlement: *Re Hodgson*, [1913] 1 Ch. 34; 82 L. J. Ch. 31.

The doctrine of *quasi*-purchase of part of the husband's fortune plies to post-nuptial settlements: *Montefiore* v. *Behrens* (1865), R. 1 Eq. 171; 35 Beav. 95; 147 R. R. 44; *Mackintosh* v. *Pogose*, *ra*, p. 378; and is not affected by the Married Women's Proty Act, 1882, s. 3: *Mackintosh* v. *Pogose*, *supra*; which is also only case in which a direction that a limitation for life should se on alienation (as distinguished from a limitation for life or il alienation) has been held good, no reference being made to h distinction.

Post-nuptial settlements.

A mere prohibition against alienation is void: *Brandon* v. *binson* (1811), 18 Ves. 429; 11 R. R. 226; *Re Fitzgerald*, [1903] h. 933; 72 L. J. Ch. 430.

Mere prohibition against alienation void.

A trust for payment of income until a man "shall become bankt, etc.," is rendered nugatory by his being bankrupt at the date he settlement: *Manning* v. *Chambers* (1847), 1 De G. & Sm. 282; L. J. Ch. 245; 75 R. R. 102; but in *West* v. *Williams*, [1899] h. 132; 68 L. J. Ch. 127, it was held, reversing Kekewich, J.,

Where tenant for life is already bankrupt.

[1898] 1 Ch. 488, that where a man who had already mortgaged hi life interest settled it upon himself "until he shall assign charge o incumber the same," the words had not a retrospective operatior so as to include the mortgage already created.

For an exhaustive list of cases dealing with determinable lif interests, see Key & Elphinstone's Precedents in Conveyancin (11th ed.), p. 589 n.

Property may be given to woman for separate use.

Property, whether real or personal, and an interest therein, whether absolute or for life, ca be limited to, or in trust for, a woman for he separate use during coverture.

If unmarried attaches on her marriage.

The woman need not be married when the limitation or trus takes effect, for if she subsequently marries, the separate us attaches and lasts during the coverture: *Tullett* v. *Armstron* (1839), 4 My. & Cr. 377; 9 L. J. Ch. 41; 49 R. R. 280; but "ther is no such thing as separate property of an unmarried woman": *p* Kay, L.J., *Pelton Bros.* v. *Harrison*, [1891] 2 Q. B. 422, at p. 425 60 L. J. Q. B., at p. 743.

Effect of Married Women's Property Act on separate estate.

By the Married Women's Property Act, 1882, s. 2: "Ever woman who marries after" 1882 "shall be entitled to have and t hold as her separate property and to dispose of" by will o otherwise in the same manner as if she were a *feme sole* withou the intervention of any trustee "all real and personal propert which shall belong to her at the time of marriage or shall be acquire by or devolve upon her after marriage"; and by section 5 the same Act "every woman married before" 1883 "shall b entitled to have and to hold and to dispose of in manner aforesa as her separate property all real and personal property, her tit to which, whether vested or contingent, and whether in possessio reversion, or remainder" (which means her first title to the pr perty: *Reid* v. *Reid* (1886), 31 Ch. D. 402; 55 L. J. Ch. 294 "shall accrue after" 1882; but, though a large mass of proper thus becomes the separate property of married women, by section of the same Act, "nothing in this Act contained shall interfe with or affect" (which means invalidate or render inoperative: *p* Lindley, L.J., *Re Armstrong* (1888), 21 Q. B. D. 264, at p. 27 57 L. J. Q. B. 553) "any settlement or agreement for a settleme made or to be made, whether before or after marriage, respecti the property of any married woman," and therefore all settlemen must be construed as if the Act had not been passed: *Hancock* *Hancock* (1888), 38 Ch. D. 78; 57 L. J. Ch. 396; *Stevens* v. *Trev Garrick*, [1893] 2 Ch. 307; 62 L. J. Ch. 660; *Buckland* v. *Bucklan* [1900] 2 Ch. 534; 69 L. J. Ch. 648. Consequently property whi

As regards marriage settlements.

eparate property under the Act is not "property settled to her arate use" within the exception of a covenant to settle after-uired property contained in a marriage settlement: *Re Stonor* 33), 24 Ch. D. 195; 52 L. J. Ch. 776; *Re Whitaker* (1887), 34 D. 227; 56 L. J. Ch. 251.

By section 2, sub-section 1 of the Married Women's Property , 1907: "Notwithstanding section nineteen of the Married men's Property Act, 1882, a settlement or agreement for a lement made after the commencement of this Act by the hus-d or intended husband, whether before or after marriage, pecting the property of any woman he may marry or have rried, shall not be valid unless it is executed by her if she is of age, or confirmed by her after she attains full age." Sub-tion 2 provides that if such woman dies an infant any covenant disposition by her husband contained in the settlement or agree-nt shall bind or pass any interest in any property of hers to ich he might become entitled on her death and which he could e bound or disposed of if "this Act had not been passed." -section 3 provides that nothing in the section shall render alid any agreement or settlement made or to be made under the visions of the Infant Settlements Act, 1855.

What words will create separate use.

In a limitation to or trust for a woman any expression, from which the intention to exclude a husband can be clearly inferred, will have the effect of creating a separate use during coverture.

"I take the principle, therefore, to be now thoroughly estab-ed that Courts of Equity will not deprive the husband of his ts at law unless there appears to be a clear intention manifested the testator that the husband should be so excluded. If these be principles that regulate the construction of a will, how much re forcibly ought they to apply to a case like the present of a itation contained in a deed?" *per* Lord Brougham, C., *Tyler Lake* (1831), 2 Russ. & My. 183, at p. 188; 34 R. R. 53.

"The intention to give a separate estate must be clearly ressed": *per* Leach, M.R., *Kensington* v. *Dolland* (1834), y. & K. 184, at p. 188; 3 L. J. Ch. 209.

"For separate use there must be words referring to the event marriage, and creating a separate character or directing an lusive enjoyment": *per* Lord Westbury, C., *Spirett* v. *Willows* 65), 34 L. J. Ch. 365, at p. 368; 3 De G. J. & S. 293, at p. 304; W. R. 329, at p. 330; 142 R. R. 65.

Restraint on anticipation does not

Words imposing a restraint on alienation or anticipation unac-panied by words creating a separate use do not by implica-create a separate use, but are merely void: *Baggett* v. *Meux*

create separate use.

(1844), 1 Coll. 138; 13 L. J. Ch. 228; 65 R. R. 471; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661 : *per* Lindley, L.J. (60 L. J. Q. B. 669; *Re Lumley*, [1896] 2 Ch. 690, at p. 694; 65 L. J. Ch. 837.

More easily created in marriage settlements than in other deeds.

Though as a general rule words, which in a will would not b sufficient to create a separate use, are insufficient to do so wh contained in a deed (see *per* Lord Brougham, C., *Tyler* v. *La* (1831), 2 Russ. & My. 183, at p. 188), yet they may be suf cient when contained in a marriage settlement. "Taking the wo 'sole' as applied to the case of a marriage settlement—to a case contemplated devolution of property upon a married (*sic*, s *quaere*) lady at a time when she is about to put herself in such position that unless she be guarded and defended as to that whi is her property and under her own control and management, t husband will acquire together with her an interest in it—in all tho cases the word 'sole' finds its ready and appropriate meaning in i being a provision to secure the property against the control of t husband, and to give to her the sole and absolute disposition it" : *per* Lord Hatherley, C., *Massy* v. *Rowen* (1869), L. R. H. L. 288, at p. 297.

Separate use created in deeds not marriage settlements.

The following words have been held sufficient to create a separa use in deeds not being marriage settlements : "as though she was single woman," in a deed of assignment of leaseholds operating a declaration of trust by a husband : *Baddeley* v. *Baddeley* (1878 9 Ch. D. 113; 48 L. J. Ch. 36; "not to be assignable, etc." in trust deed providing pensions for the widows and children of cler in the East India Company's service : *Re Peacock's Trusts* (1879 10 Ch. D. 490; 48 L. J. Ch. 265; "as her separate estate" in a assignment of leaseholds operating as a declaration of trust by husband : *Fox* v. *Hawks* (1879), 13 Ch. D. 822; "own proper u and benefit," and she to have "full power and authority to s and give receipts," in a deed of gift made by a husband : *Surm* v. *Wharton*, [1891] 1 Q. B. 491; 60 L. J. Q. B. 233; while t following words have been held not sufficient to do so in such deed "into their own proper and respective hands to and for their ov respective use and benefit" : *Tyler* v. *Lake* (*supra*); "for h own use and benefit" : *Kensington* v. *Dolland* (*supra*, p. 381 "in trust only for" : *Spirett* v. *Willows* (*supra*); "to a for her and their own use and benefit," in an ultimate trust default of issue : *Darcy* v. *Croft* (1858), 9 Ir. Ch. R. 19. The de was a marriage settlement, but the question arose on the ultima trusts and not on the wife's life estate, and therefore the constru tion was similar to that of deeds not being marriage settlements.

Not so created.

Separate use created in marriage settlements.

The following words have been held sufficient to create separate use in marriage settlements : "sole use benefit and d position" : *Ex p. Ray* (1815), 1 Madd. 199; "for her own sole a

ırate use" : *Williams* v. *Waters* (1845), 14 M. & W. 166; ll and sole use and benefit" : *Arthur* v. *Arthur* (1848), 11 Eq. R. 511; a direction that a jointure should be paid to K ithout the power of anticipation, . . . the sole and separate ipt of the said K to be a complete and only discharge" : *Re yneux's Estate* (1872), Ir. R. 6 Eq. 411.

The cases on wills are collected in Theobald on Wills, c. 46 ı ed.), pp. 640 *et seq.*

Remainder given for separate use.

When the interest of the woman is not in possession, but is in ainder, a question may arise whether the separate use attaches nce, so that the woman, if married, can dispose of her interest nediately, or whether it only arises when the interest falls into session. The cases are perhaps not easily reconcilable.

When a married woman takes a vested reversionary interest for separate use, it arises immediately : *Sturgis* v. *Corp* (1806), Ves. 190; 9 R. R. 169; *Re Molyneux's Estate* (*supra*).

Where policies of assurance on the life of the husband were gned to trustees on trust to receive the money and pay the me to the wife for her separate use, it was held that the separate did not arise during the husband's life : *King* v. *Lucas* (1883), 23 D. 712; 53 L. J. Ch. 64; *Re Shakespear* (1885), 30 Ch. D. 169; L. J. Ch. 44.

Contingency.

Where a married woman takes a life estate on the happening of ere contingency (such as the insolvency of her husband) for her arate use, the separate use does not attach till the contingency pens : *Mara* v. *Manning* (1845), 2 Jo. & Lat. 311; *Bestall* v. *bury* (1861), 13 Ir. Ch. R. 549; *Keays* v. *Lane* (1869), Ir. R. q. 1.

Whether separate use revives on re-marriage.

It was said, in *Tudor* v. *Samyne* (1692), 2 Vern. 270, citing *Sir ward Turner's Case* (1681), 1 Vern. 7, that where property is n *absolutely* to a married woman for her separate use, the arate use does not revive on her second marriage; but in *ett* v. *Armstrong* (1839), 9 L. J. Ch. 41; 49 R. R. 280; 4 & Cr. 377; it is stated by the reporter (p. 389) that the perty in question in *Tudor* v. *Samyne* was not settled to the nan's separate use, and it appears from the report in 1 Vern. in *Sir Edward Turner's Case* also, the property was not ed to the woman's separate use, and Lord Cottenham, C., his judgment in *Tullett* v. *Armstrong* says (p. 394) : "If *E. Turner's Case* be correctly stated in *Tudor* v. *Samyne*, h differs from the report in 1 Vern. 7, and if *Tudor* v. *Samyne* tself accurately reported, they would be instances of property ed to the separate use of a woman being alienable by an after n husband. I do not, however, think that either is of any e upon the present question. They are of too early a date :

the accuracy of the report upon this subject cannot be depend upon, and the point was not raised or argued and cannot be sa to have been decided." The point has not arisen since.

Separate use of a life interest revives.

Where, however, property is given for life only for a woman separate use, the separate use revives on her re-marriage: *Gaffee* (1850), 1 Mac. & G. 541; 84 R. R. 152; on appeal fro 7 Ha. 101; *Hawkes* v. *Hubback* (1870), L. R. 11 Eq. 5; 40 L. J. C 49; and she can of course deal with the property while not und coverture: *Wright* v. *Wright* (1862), 2 J. & H. 647; 134 R. R. 378

Divorce.

In the case of *Shafto* v. *Butler* (1871), 40 L. J. Ch. 30 19 W. R. 595, part of the husband's property was settled duri the joint lives of himself and his wife for her separate use witho power of anticipation. The wife obtained a divorce and marri again during the husband's life. *Held*, that the separate use a restraint on anticipation revived.

Restraint on anticipation is only applicable to separate use.

A restraint on anticipation can be attached property given to a married woman for her separa use, but to no other property.

"Can a *feme sole*, or can a man, be restrained from anticipati or disposing by way of anticipation of any property to which s or he is entitled? No. A married woman under coverture ca but how and why? Simply as regards property settled to h separate use": *per* Cotton, L.J., *Pike* v. *Fitzgibbon* (1881), Ch. D. 454, at p. 464; 50 L. J. Ch., at p. 398.

"A restraint on anticipation can never exist except as accessory to a trust for a separate use": *per* Fry, L.J., *Stogdon Lee*, [1891] 1 Q. B. 661, at p. 670; 60 L. J. Q. B. 669. A restrai on anticipation can be annexed to property which is only separa estate by virtue of the Married Women's Property Act, 188 *Re Lumley; Ex p. Hood-Barrs*, [1896] 2 Ch. 690; 65 L. J. Ch. 8

Restraint on anticipation can be imposed on any property given for separate use.

A restraint on anticipation can be attached any property given to a married woman for h separate use, whether real or personal, and wheth the interest therein be absolute or for life.

"The object of the doctrine" (*i.e.*, the doctrine of separate u "was to give a married woman the enjoyment of property indepe dent of her husband; but to secure that object it was absolut necessary to restrain her during coverture from alienation. T reasoning evidently applies to a fee as much as to a life estate, real property as much as to personal": *per* Lord Lyndhurst, *Baggett* v. *Meux* (1846), 1 Ph. 627, at p. 628; 15 L. J. Ch. 26 65 R. R. 471.

. restraint on anticipation can be attached to a life interest with- impeachment of waste : *Re Lumley; Ex p. Hood-Barrs, supra.* Life interest *sans* waste.

The woman need not be married when the limitation or trust s effect, for if she subsequently marries, the restraint on icipation attaches and lasts during the coverture : *Tullett* v. *strong, supra*, p. 383. If unmarried attaches on marriage.

The interest of a married woman (who was a German national) property in England settled upon her for life without power anticipation was held subject to the charge imposed by ion 1 (xvi) of the Treaty of Peace Order, 1919, upon all perty, rights and interests in this country belonging to German onals at the date of the coming into force of the Treaty of sailles, notwithstanding the restraint upon anticipation : *Public stee* v. *Wolf*, [1923] A. C. 544; 92 L. J. Ch. 520. Effect of war legislation.

Held, that a spinster about to be married had power by a deed operating by way of a direction to the trustees to remove the raint on anticipation attached to her share of a trust fund, and for the purposes and subject to the conditions imposed by the l poll she had power to deal with her share by way of anticipa- during coverture : *Re Chrimes*, [1917] 1 Ch. 30; 86 L. J. 217. See also *Re Wood* (1889), 61 L. T. 197.

By section 169 of the Law of Property Act, 1925 : Where a ried woman is restrained from anticipation or from alienation espect of any property or any interest in property belonging to or is by law unable to dispose of or bind such property or her rest therein, including a reversionary interest arising under her riage settlement, the Court may, if it thinks fit, where it appears he Court to be for her benefit, by judgment or order, with her sent, bind her interest in such property. With this section ld be considered the following sections of the Settled Land 1925 : New Law.

Section 1, sub-section 1 (iv) provides that a restraint on anticipa- annexed to a legal estate or any other interest constitutes a ement.

Section 20, sub-section 1 (x) provides that a married woman led to land for an estate in fee simple or for a term of years lute, subject to a restraint on anticipation, is a tenant for life r the Act. She must, of course, be of full age and her estate terest must be in possession.

Further, section 25 of the same Act provides that a restraint nticipation in the settlement shall not prevent the exercise by a ied woman of full age of any power under the Act.

No particular form of words is necessary in order to impose a restraint on anticipation : *per* Lord What words will impose restraint.

Cranworth, V.-C., *Re Ross's Trust* (1851), 1 Sin (N.S.) 196, at p. 199; 20 L. J. Ch. 293; 89 R. I 63; but the restraint will not be imposed unless th language is clear.

Restraint imposed.

Trust in a marriage settlement during the wife's life to recei the income *as it should become due*, and pay it to such person she should from time to time appoint, or permit her to receive for her separate use, with a declaration that her receipt or t receipts of any person or persons to whom she might appoint *after it became due* should be discharges. *Held*, to impose restraint on anticipation: *Field* v. *Evans* (1846), 15 Sim. 375; R. R. 100. This decision is said by Stuart, V.-C., to be wrong reported: *Baker* v. *Bradley* (1854), 2 Sm. & Giff. 531, at p. 56 but was approved in *Baker* v. *Bradley* (1855), 7 De G. M. & G. 59 at p. 612, by Knight-Bruce, L.J., who sent for the record; *ibid.*, p. 609. See 25 L. J. Ch. 7; 109 R. R. 245.

Covenant in a marriage settlement to settle the wife's aft acquired property on trust to pay the income to the wife or h appointees, to the intent that the same might remain a separa personal and inalienable provision for her during the covertu and on further trust to pay, assign, or otherwise dispose of t same from time to time to the wife's appointees by deed or w *Held*, that the wife was entitled to an interest during the covertu for her separate use without power of anticipation, with power appoint the reversion expectant on the interest reserved to h during coverture: *Spring* v. *Pride* (1864), 4 De G. J. & S. 39 140 R. R. 841.

"The receipts of her for the rents to be given as the sa should become due from time to time." *Held*, a restraint anticipation: *Re Smith; Chapman* v. *Wood* (1884), 51 L. T. 501

Restraint not imposed.

Payment of income to be made to such persons as the w "from time to time" should direct. *Held*, not a restraint: *Pyl* v. *Smith* (1791), 3 Br. C. C. 340.

The cases on wills are collected in Theobald on Wills, c. (7th ed.), p. 645.

Separate estate is alienable without express power.

It was thought formerly, before the nature of separate estate thoroughly understood, that a woman could not dispose of separate estate unless she had an express power to do so; accordingly the older forms gave the woman express power to pose of the property, with a direction that, until and in defaul any exercise of the power, the income was to be paid to her for separate use. In some of the older cases, where the restraint anticipation was annexed to the power only, it was held th though the property could not be disposed of by anticipation un

Restraint annexed to power only.

power, yet it might be disposed of under the proprietary right erred by the trust for separate use : *Barrymore* v. *Ellis* (1836), m. 1; 42 R. R. 77; but this opinion was long since overruled : *nett* v. *Macdougall* (1845), 8 Beav. 187; *Brown* v. *Bamford* 46), 1 Phil. 620; 15 L. J. Ch. 361; 65 R. R. 467.

Restraint annexed to a remainder.

If the restraint is annexed to a reversionary interest a question 7 arise whether the restraint only prevents dealing with the rest before it falls into possession, or prevents also dealing with hen in possession.

In *Re Bown* (1884), 27 Ch. D. 411; 53 L. J. Ch. 881, all the r cases are discussed, and it was decided by the Court of Appeal : the effect of the restraint depends entirely on the intention ressed. If the fund itself is given to the woman she is entitled ave it paid to her, the only effect of the restraint being to pre- t her from dealing with it before it falls into possession; but, on other hand, if the income only is given to her, the trustees must in the fund, and pay the income only to her without anticipation ing coverture. All the cases are cases on wills.

Restraint revives on remarriage.

The restraint on anticipation revives on a second marriage : *lett* v. *Armstrong* (1839), 4 My. & Cr. 377; *Re Gaffee* (1850), Iac. & G. 541; *Shafto* v. *Butler* (1871), 40 L. J. Ch. 308; 19 R. 595; unless confined to a particular coverture : *Re Gaffee ora*).

Estates *pur autre vie.*

With regard to estates *pur autre vie*, a grant to A for the life of ives A an interest during B's life though B may survive A, for—

Words of limitation not necessary to create estate *pur autre vie:*

> No words of limitation are necessary for the creation of an estate *pur autre vie.*

The authorities for this proposition are : Co. Litt. 41 b; Shep. ch. 106; *Castle* v. *Dod* (1617), Cro. Jac. 200 : *per* Brady, L.C.), *Brenan* v. *Boyne* (1865), 16 Ir. Ch. Rep. 87, at p. 93; and ppears to be the better opinion that—

nor on conveyance of estate *pur autre vie*, if intention to pass whole interest apparent.

> No words of limitation are necessary for the effectual conveyance of an estate *pur autre vie* by the owner thereof to a grantee; but an intention to pass the whole interest must be shown.

The chief authorities for this proposition are : *Williams* v. *Jekyl* 5), 2 Ves. Sen. 681 (as to estates not originally limited to the tee and his heirs); *Doe* v. *Cassidy* (1807), 1 Hud. & Bro. 222, n.; *hen* v. *Carnegie* (1859), 4 Drew. 587; 28 L. J. Ch. 930; 113 R. 470; *M'Clintock* v. *Irvine* (1860), 10 Ir. Ch. Rep. 480; *Re ey* (1863), 16 Ir. C. Rep. 215; *Brenan* v. *Boyne* (1865), 16

Ir. Ch. Rep. 87; *Currin* v. *Doyle* (1878), 3 L. R. Ir. 265; *sed cont* *Dawson* v. *Dawson* (1850), 13 Ir. L. R. 472; *Barron* v. *Barro* (1858), 8 Ir. Ch. Rep. 366 (affirmed on appeal on another poin Ball, J., doubting whether words of limitation were necessar (1859), 10 Ir. Ch. Rep. 120); *Lamphier* v. *Drapes* (1863), Ir. Ch. Rep. 33.

But intention to transfer all the interest must be shown.

It is sufficient to vest the lands in the grantee for the who interest of the tenant *pur autre vie:* as *e.g.*, if the tenant *pur aut* *vie* assign the lands and all her right, title and interest to the u of the grantee: *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681; grant the lands to the grantee, his executors, administrators, ar assigns: *Northen* v. *Carnegie* (*supra*); or grant the lands the grantee for the life of the *cestui que vie*, or grant h estate in the lands to the grantee, or grant the land to th grantee and his heirs: *per* Brady, L.C. (Ir.), *Brenan* v. *Boy* (*supra*), at pp. 97—100. But in some way or another th deed must show an intention to pass the whole *quasi*-fee: *p* Brady, L.C., *ubi supra*. And a mere conveyance of the lan to the grantee will not vest in him an estate not determinab on his own death in the life of the *cestui que vie*: *per* Bayley, J *Doe* v. *Robinson* (1828), 8 B. & C. 296, at p. 305; 2 Man. & 249; but it may be that section 63 of the Conveyancing Act, 18 (replaced by section 63 of the Law of Property Act, 1925), whic enacts that every conveyance is, unless a contrary intention expressed, effectual to pass all the estate, etc., which the co veying parties have in the property conveyed, or which they ha power to convey, makes any conveyance sufficient to pass th whole estate *pur autre vie*.

Effect of Conveyancing Act.

Devolution determined by words of limitation.

Although no words of limitation are necessary to vest in th grantee the whole estate *pur autre vie*, and to give him a comple power of disposition thereover, yet the devolution of an estate *p* *autre vie* on the death of a tenant *pur autre vie*, who has die during the life of the *cestui qui vie* without having disposed the same *inter vivos* or by will, is determined according to wha if any, words of limitation have been used in the creation the estate or the conveyance thereof to the deceased.

New Law.

An estate *pur autre vie* is an equitable interest, and on th death of a tenant *pur autre vie* during the life of the *cestui que v* without having disposed of such interest it passes to his person representatives who hold it upon trust for the persons who ta on the intestacy of the tenant *pur autre vie*.

Special occupancy is abolished as to deaths after 1925 by th Administration of Estates Act, 1925, s. 45.

If limited to "heirs" heir

If lands were limited to the grantee and his heirs *pur autre v* then on his death during the life of the *cestui que vie* witho

'ing disposed of the estate *inter vivos* or by will, the whole legal l beneficial interest vested (before the Land Transfer Act, 1897, ıe into force) in the heir of the deceased, who took, however, by descent, but as special occupant (Co. Litt. 41 b) in the ıe manner, and, since the Statute of Frauds, subject to the same ɔilities for debts, etc., as if the deceased had been seised thereof fee simple. But by the Land Transfer Act, 1897, s. 1, ɔ-s. 1 (*a*), estates *pur autre vie*, in common with other estates, v devolve upon the legal personal representatives of the deceased, l by section 2, sub-section 1 (*b*) the legal personal representatives d the same, subject to their powers and duties in the administra- n, in trust for the persons by law beneficially entitled thereto, ., in the case supposed, the heir.

takes as special occupant.

Formerly, if borough English lands were limited to one and heirs *pur autre vie*, on the death of the tenant without having posed thereof, his customary heir took as the special occupant: *xter* v. *Doudswell* (1675), 2 Lev. 138; 3 Keb. 475, 486, 498; *wnsend's Case*, cited by Holt, C.J., in *Clements* v. *Scudamore* '03), 2 Ld. Raym. 1024, at p. 1028; 1 Salk. 243.

Customary heir.

As before mentioned, the heir took not as heir by descent of an ate of inheritance, but as the special occupant marked out by the ms of the grant: *Whiskins* v. *Davie* (1610), 2 Roll. Abr. 151 2; *Bowles* v. *Poor* (1611), 1 Bulstr. 135; and see *per* Talbot, L.C., *aplin* v. *Chaplin* (1735), 3 P. Wms. 365, at p. 368; *per* Verney, R., *Kendal* v. *Micfield* (1740), Barnard. Ch. 46, at p. 48; *per* nyon, C.J., *Doe* v. *Luxton* (1795), 6 T. R. 289, at p. 291; *per* ndersley, V.-C., *Northen* v. *Carnegie* (1859), 4 Drew. 587, at 590; and *per* Fry, J., *Re Barber's Settled Estates* (1881), 18 . D. 624, at p. 627; 50 L. J. Ch. 769. The opinion that the heir such a case took as heir of a descendible freehold is now generally ındoned. The chief authorities in its favour are: equivocal ervations of Bracton, Lib. 2, c. ix. (*haeredes ei succedent*), and Lord Coke in *Edward Seymor's Case* (1612), 10 Rep. 95 b, at 98 a; a *dictum* in *Walsingham's Case* (1572), Plow. 547, at p. 556; dissenting judgment of Vaughan, C.J., in *Holden* v. *Smallbrooke* 70), Vaugh. 187, at p. 201; and the judgment of De Grey, C.J., *Doe* v. *Martin* (1777), 2 Wm. Bl. 1148, at p. 1150.

If the estate *pur autrie vie* were limited to the grantee, without ds of limitation, or to the grantee and his assigns, or to the ntee, his executors, administrators and assigns, it vested, on the th of the grantee during the life of the *cestui que vie* without

If not limited to heirs legal personal representatives take.

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a) Replaced by Part I, section 1, sub-sections 1 and 3 of the Administration Estates Act, 1925, as regards deaths after 1925.

b) Reproduced with amendments by section 2, sub-section 1 of the Adminis- ion of Estates Act, 1925.

having disposed thereof *inter vivos* or by will, in his legal person representatives as part of his personal estate : Statute of Fraud 29 Car. 2 (1677), c. 3, s. 12; 14 Geo. 2 (1741), c. 20, s. 9; an Wills Act, 1837, s. 6, which replaces the earlier statutory provision Prior to the Statute of Frauds, if the executors were not named i the limitations, the estate was subject to general occupancy.

Quaere, how they took.

There was, and still is, some doubt whether the legal person representatives, when mentioned in the limitations, prior to th Statute of Frauds took, and whether subsequent to that statut they could be said to take, as special occupants, or by virtue of th Statutes. The better opinion seems to be that they took, a special occupants : 2 Roll. Abr. 151, G. 2; *Duke of Devonshire* v *Atkins* (1726), 2 P. Wms. 381; *Kendal* v. *Micfield* (1740), Barnard Ch. 46; *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681; *Ripley* v *Waterworth* (1802), 7 Ves. 425; *Re Michell; Moore* v. *Moore* [1892] 2 Ch. 87; 61 L. J. Ch. 326; *sed contra, per* Lord Redesdale *Campbell* v. *Sandys* (1803), 1 Sch. & Lef. 281, at p. 289; 9 R. R. 33

But since the Statute of Frauds, it made no difference how the took, for even if they took as special occupants, they took th estate impressed with a trust for the persons entitled under the wi or intestacy of the deceased : *Duke of Devonshire* v. *Atkins* (1726 2 P. Wms. 381; *Ripley* v. *Waterworth* (1802), 7 Ves. 425; *R Michell* (*supra*).

Examples.

H, to whom a rentcharge had been limited to him and h assigns, conveyed it to K, his executors, administrators an assigns, habendum to K, his heirs and assigns, in trust for K h executors, administrators and assigns; on K's death it was hel that the rentcharge devolved upon K's heir as special occupant i trust for K's executors : *Kendal* v. *Micfield* (1740), Barnard. Ch 46. If there be a grant to A and his executors for the life of B habendum to A and his heirs for the life of B, his heirs shall hav the benefit; if there be a grant to A and his heirs for the life of B habendum to A and his executors for the life of B, the executo shall have the benefit : *per* Verney, M.R., *Kendal* v. *Micfiel* (1740), Barnard. Ch. 46, at p. 48.

Under a declaration of trust of an estate *pur autre vie*, i favour of A, his heirs, executors, administrators and assigns, th heir, not the legal personal representative, is entitled : *Atkinso* v. *Baker* (1791), 4 T. R. 229; 2 R. R. 366.

Lands were demised to H. T., her heirs and assigns, habendu to H. T. and her assigns, for the life of G. T.; that part of th habendum which merely qualified the estate granted in the premis by cutting it down to an estate *pur autre vie* was accepted, bu that part which was repugnant to the premises by reason of i not limiting the estate to the heir as special occupant was rejected

v. *Steele* (1843), 4 Q. B. 663; 3 G. & D. 622; 12 L. J. Q. B. ; 62 R. R. 456.

'A tenant *pur autre vie* may alter the nature of the limitation, is to say, if the estate be limited to him and his heirs, he grant or devise it to another and his executors, and *vice a*" : *per* Verney, M.R., *Kendal* v. *Micfield* (1740), Barnard. 46, at p. 48.

Devolution can be changed by owner.

'It has long since been established that in determining the lity of an estate *pur autre vie*, that is, whether it goes to a ial occupant or to the executor by Statute, you look to the ns of the last conveyance of the estate, and not to the original nt, to ascertain whether it is to go to the heir or to the legal sonal representative. If it is to go to the heir my present ression is that express words are necessary, and that in a deed, all events, the word 'heir' must be used for the purpose of gnating the special occupant": *per* Lord Davey, *Earl of ntcashell* v. *More Smyth*, [1896] A. C. 158, at p. 165; 65 J. P. C. 12.

There appeared to be some doubt whether, if an estate *pur autre* were limited to one and his heirs, and he granted or devised it nother without any words of limitation, it devolved on the heir the grantee as special occupant, or on his executors or adminis- tors under the Statutes; but the better opinion seems to be that levolved on the executors.

Quaere whether devolution changed without express words.

The former view is supported by the following cases :—

Lands demised to A and his heirs for three lives. A devised to who died intestate. *Held*, that M's co-heiresses were entitled : *lpotts* v. *James* (1784), 3 Dougl. 425.

Lands were demised to B and his heirs for three lives. B devised his estate and interest therein to be divided equally between his e sons. One of the sons died, leaving the lessor of the plaintiff heir-at-law; the defendant obtained administration; judgment given for the lessor of the plaintiff and affirmed on appeal; *es* v. *Blake* (1813), 1 Hud. & Bro. 227, n.; *Wall* v. *Byrne* 45), 2 Jo. & Lat. 118; 69 R. R. 253; *Re King*, [1898] 1 Ir. R. [1899] 1 Ir. R. 30.

The latter view is supported by the following cases :—

A lessee of lands limited to himself and his heirs for lives devised right and title in and to the same to M. K. On M. K.'s death, out having disposed thereof, it was held the estate went to her utors and not to her heir : *Doe* v. *Cassidy* (1807), 1 Hud. & . 222, n.; *Jack* v. *Jamieson* (1811), 1 Hud. & Bro. 225, n.

Lands were demised to A, his heirs and assigns for lives. evised the same to B and his assigns during the residue of the e. *Held*, that the interest of A's heirs as special occupants

being defeated and no special occupant being named in the devis the estate went on B's death intestate to his administrat under the Statute of Frauds : *Doe* v. *Lewis* (1842), 9 M. & W. 66 11 L. J. Ex. 305; 60 R. R. 855.

A share of freehold lands was conveyed to the testator, his hei and assigns, for the life of the grantor. The testator devised t same to trustees and their heirs in trust for his grandson, a died; on the death of the grandson intestate, it was held that t grandson's administrator, and not his heir, was entitled (it bei agreed that the testator's whole interest passed by the devise *Re Inman*, [1903] 1 Ch. 241; 72 L. J. Ch. 120.

It follows from the fact that words of inheritance are unnec sary for the conveyance of estates *pur autrie vie* that—

No words of limitation necessary in executed trusts.

> Words of inheritance are unnecessary for t limitation of equitable interests in estates *pur aut vie* in executed trusts. [As far as the new proper legislation is concerned this rule is of no importan or effect.]

The authorities for this proposition are *M'Clintock* v. *Irvi* (1860), 10 Ir. Ch. Rep. 480; *Re Bayley* (1863), 16 Ir. Ch. Re 215; *Brenan* v. *Boyne* (1865), 16 Ir. Ch. Rep. 87; *Currin* v. *Do* (1878), 3 L. R. Ir. 265; *Earl of Mountcashell* v. *More-Smyth*, [189 A. C. 158; *contra*, *Barron* v. *Barron* (1858), 8 Ir. Ch. Rep. 366.

Settlement of estates *pur autre vie*.

Lesser interests may be carved out of the absolute interest an estate *pur autre vie* just as they may be carved out of an est of inheritance in fee simple, and although estates *pur autre vie* not entailable under the statute *De Donis Conditionalibus*, Edw. 1 (1284), c. 1, interests corresponding to estates tail may created, and are called *quasi*-estates tail.

Quasi-estates tail.

The heirs of the grantee's body may be made special occupant 2 Roll. Abr. 151, G. 1; and see *Finch* v. *Tucker* (1690), 2 Ve 184; *Baker* v. *Bayley* (1691), 2 Vern. 225; *Duke of Grafton* *Hanmer* (1722), 3 P. Wms. 266, n.; *Norton* v. *Frecker* (173 West. t. Hardwicke, 203; 1 Atk. 524; *Allen* v. *Allen* (1842), 2 D & War. 307; 59 R. R. 696.

For life with remainder.

So an estate *pur autre vie* may be limited to one for life, w remainders in *quasi*-fee or *quasi*-tail : *Wastneys* v. *Chappell* (171 3 Bro. P. C. 50; *Duke of Grafton* v. *Hanmer* (1722), 3 P. Wr 266, n.; *Low* v. *Burron* (1734), 3 P. Wms. 262; *Norton* v. *Frec* (1737), West. t. Hardwicke, 203; 1 Atk. 524.

Executory limitations.

Or the absolute interest may be given to a grantee either imr diately or in remainder with an executory limitation over on defa of issue : *Wastneys* v. *Chappell* (1714), 3 Bro. P. C. 50; *Salt*

v. *Saltern* (1742), 2 Atk. 376; *Re Barber's Settled Estates* (1881), 18 Ch. D. 624; 50 L. J. Ch. 769.

In all these cases the analogy of estates of inheritance is followed except that contingent remainders in estates *pur autre vie* were always indestructible in the sense in which contingent remainders in estates of inheritance were made indestructible by 8 & 9 Vict. (1845), c. 106, s. 8 (*c*): *Pickersgill* v. *Grey* (1861), 30 Beav. 352; 31 L. J. Ch. 394; 132 R. R. 301; and that fines and recoveries were not, before the Fines and Recoveries Act (3 & 4 Will. 4 (1833), c. 74) (*d*), and inrolled deeds are not, since that Act, necessary for barring *quasi*-estates entail.

Quasi-estates tail.

The decisions as to *quasi*-estates tail are considered by Sir Ed. Sugden, C., in *Allen* v. *Allen* (*supra*), and his judgment may be summarised as follows:—(i) A *quasi*-estate tail is not to be compared to a fee simple conditional, and a *quasi*-tenant in tail does not on the birth of issue take an absolute interest or any greater power of alienation than he had before; he may bar the *quasi*-estate tail before issue born by act *inter vivos* (*Grey* v. *Mannock* (1765), 2 Eden, 339, which is *contra*, was disapproved). (ii) Remainders may be limited after an estate in *quasi*-tail: *Wastneys* v. *Chappell* (1714), 3 Bro. P. C. 50; *Low* v. *Burron* (1734), 3 P. Wms. 262. (iii) *Quasi*-estates tail and remainders limited after them may be barred by any disposition *inter vivos* of the tenant in tail in possession, or the tenant for life and tenant in tail in remainder together: *Baker* v. *Bayley* (1691), 2 Vern. 225, where the lease was surrendered and renewed to the tenant in tail absolutely; *Duke of Grafton* v. *Hanmer* (1722), 3 P. Wms. 265, n. where tenant for life, a married woman, and tenant in tail in remainder levied a fine; *Norton* v. *Frecker* (1737), West. t. Hardwicke, 203; 1 Atk. 524, where tenant for life and tenant in tail in remainder made a re-settlement by deed; *Forster* v. *Forster* (1741), 2 Atk. 259, where the tenant for life was also, in events which had happened, first tenant in tail in remainder, and re-settled the land by deed; *Grey* v. *Mannock* (1765), 2 Eden, 339, also stated 6 T. R. 292, where the lease was surrendered and renewed to the tenant in tail in possession; *Blake* v. *Blake* (1786), 1 Cox, 266; 1 R. R. 35; 3 P. Wms. 10, n.; *S. C. sub nom. Doe* d. *Blake* v. *Luxton* (1795), 6 T. R. 289; *sub nom. Blake* v. *Luxton* (1815), G. Coop. 178; 14 R. R. 235, where the lease was surrendered and renewed to the tenant in tail in possession. (iv) But such remainders limited after estates tail cannot be barred by the tenant in *quasi*-tail in remainder without the concurrence of the tenant for life: *Wastneys* v. *Chappell* (1714), 3 Bro. P. C. 50; *Duke of*

(*c*) Repealed by the Law of Property (Amendment) Act, 1924, Sched. X.
(*d*) See now Law of Property (Amendment) Act, 1924, Sched. X.

Grafton v. *Hanmer* (1722), 3 P. Wms. 265, n. (v) It is doubt whether a tenant in tail in remainder can without the concurrer of the tenant for life bar his own issue, and if so, whether, if afterwards comes into possession, the remainders over will barred without more.

Quasi-base fee.

In *Re Barber's Settled Estates* (1881), 18 Ch. D. 624, Fry, at p. 628; 50 L. J. Ch., at p. 770, thought that an alienation a *quasi*-tenant in tail in remainder without the concurrence of t *quasi*-tenant for life in possession probably "might be held create a *quasi*-base fee."

Quasi-estate tail not barred by will.

But a *quasi*-estate tail and the remainders limited after cannot be barred by will: *per* Redesdale, L.C. (Ir.), *Campbell Sandys* (1803), 1 Sch. & Lef. 281, at p. 294; 9 R. R. 33; and p Fry, J., *Re Barber's Settled Estates* (1881), 18 Ch. D. 6 at p. 628.

New Law.

It appears to be possible for an entailed interest in an est *pur autre vie* to be created in equity. It is difficult to see h such entailed interest could be barred by will by virtue of s tion 176 of the Law of Property Act, 1925, so as to defeat a interest to commence on determination of the entailed interest.

Executory limitation.

An executory limitation over of an estate *pur autre vie* cann be defeated by a prior taker of a *quasi*-estate in fee simple: *Barber's Settled Estates* (1881), 18 Ch. D. 624.

CHAPTER XIX.

USES—ESTATES OF TRUSTEES.

'se, by what Words created: Cestui que Use has Estate limited by Use: Use limited greater than Estate of Grantee to Uses: Limitation in Tail to Uses: Unto and to Use of A: No Use upon Use: To Use of A, yielding Rent to B: Where Trustees take Legal Estate: Active and passive Trusts: "Pay to or permit to receive": Legal Estate of Trustees not enlarged or diminished by nature of trusts.

As before mentioned the typical deed at common law ran : "A rants certain lands to B habendum to B and his heirs," but very arly there was ingrafted on to B's estate a declaration of the uses n which he was to hold the lands. The Statute of Uses, 27 Hen. 8 1535), c. 10, turned such uses into seisin.

No special form of words is necessary to create a use. Use, how created.

The Statute of Uses has been repealed by the Law of Property Act, 1925, 7th Schedule. New Law.

The repeal of the Statute of Uses (as amended) does not affect he operation thereof in regard to dealings taking effect before the commencement of this Act—section 1, sub-section 10, Law of Property Act, 1925.

The authorities for the above proposition are : 2nd Instit. 672; *Fox's Case* (1609), 8 Rep. 93 b; *S. C. sub nom. Smallman* v. *Powys*, Brownl. & G. 291; *Coultman, Coltman*, or *Colton* v. *Senhouse* 1677), T. Jones, 105; Pollexf. 523; 2 Lev. 225; 2 Show. K. B. 11; nd see 1 Sanders, Uses, ch. 2, s. 2, sub-s. 3, p. 95 (5th ed.).

A covenant for value "that A shall have the manor of B" raises use, but a covenant to levy a fine to uses does not do so : *Bainton* v. *R.* (1554), Dyer, 96 a, pl. 40. Examples : (1) Uses raised.

Fine levied to four, and by indenture between the parties to the ine it was declared that the said fine was levied *ea intentione* that he conusees should make an estate of the said land to such a erson which the conusor should name, with a proviso that the onusees should not be seised to any other use but to that which vas specified before, and that the conusees should not encumber

the said land. *Held*, that the conusees were seised to their c use until the conusor make nomination, and if he die without nomination, then the use should vest in his heir : *Bettuan's C* (1576), 4 Leon. 22.

A made a feoffment in fee, *sub conditione*, *ea intentione* that wife should have the land for her life, with remainder to younger son in fee. *Held*, that it was not a condition but estate which was presently executed according to the intent : *An* (1581), 4 Leon. 2, pl. 3.

Charter of feoffment, Boydell to Thomas and Randoll Crew; by an indenture of even date between the feoffees and feoffor, a reciting the charter of feoffment, it is witnessed that immedia after the feoffees, their heirs and assigns, had enjoyed the land 101 years, that then it should be lawful for the feoffor and heirs to re-enter. The two deeds had several labels which w joined together in one seal. *Held*, that it was the intent of feoffment that the feoffor should have the land again after the years, and that the intent is the use of the feoffment : *Boydel Walthall* (1591), Moore, 722.

"If a man covenants for consideration to be seised to the us himself for life, and after to the use of his son, but he further sa that his meaning is his wife shall have it for her life, this is no void clause, but good to the wife" : *per* Periam, J., *Carter Kungstead* (1591), Ow. 84.

"Forasmuch as the intention of the parties is the creatior uses, if by any clause in the deed it appears that the intent of parties was to pass it in possession by the common law, there use shall be raised" : *Fox's Case* (1609), 8 Rep. 93 b, at p. 94 a

Word "use" not essential.

"Now it is not necessary in declaring a use, if there be trans tation of possession, to use the very word *use*. Any expres whereby the mind of the party may be known that such a shall have the land, is sufficient. . . . Now in this case, here is agreement between the husband and wife, which, though void a agreement, yet is good to declare a use. As suppose a man at day make a bargain and sale, and the deed is not inrolled, or m a charter of feoffment and there is no livery, yet they will sufficient to declare the use of a fine afterwards levied between same parties" : *per* Holt, C.J., *Jones* v. *Morley* (1697), 12 M 159, at pp. 162, 163; 1 Ld. Raym. 287, at p. 290.

"Trust."

Conveyance of land to trustees and their heirs to the use settlor (a woman), her heirs and assigns till marriage, and after solemnisation thereof "in trust for the said A and her assigns her life for her sole and separate use." *Held*, that the use executed in the woman : *Williams* v. *Waters* (1845), 14 M W. 166.

B, being mortgagee in fee simple of certain lands, and the uity of redemption belonging to A, B and A released to H in e by way of mortgage subject to a proviso for redemption in vour of A, with power of sale to H (the new mortgagee). The ed contained a proviso for quiet enjoyment by A till default, and proviso that "if at any time hereafter, when and so soon as H d every other person claiming or to claim by, from, through, or ıder him, shall, under or by virtue of any power or authority rein contained, enter into or upon or shall otherwise become ssessed of the said premises or any part thereof, the same shall om thenceforth be subjected and charged to and with the yment to A, his heirs and assigns, of the annual sum of £40, ıd the same shall become recoverable by distress or otherwise on or out of the mortgaged premises." H did not execute the ed. H entered into possession. *Held*, that, though the £40 a ar, since it was charged in favour of a person who had no legal tate in the land, was not a rent reserved at common law, still was well created as a rent by the limitation of a use: *Gilbertson Richards* (1859), 4 H. & N. 277; 28 L. J. Ex. 158; 118 R. R. 34; (1860), 5 H. & N. 453; 29 L. J. Ex. 213; 120 R. R. 681.

(2) Uses not raised.

Covenant by a father on the marriage of his son not to alienate, ut that the lands shall descend to the use of the son and the heirs ıale of his body. *Held*, no use was created: *Anon.* (1561), 1 nders. 25, pl. 55; Bendl. & D. 121, pl. 153; Benl. 9, pl. 33; Leon. 6, pl. xviii, where it is stated that the father was *cestui ue use* in tail.

A father seised in fee of lands covenanted in consideration of the ıarriage of his daughter that he would suffer £20 annually to escend, go, and remain to the daughter and her husband and the eirs of their bodies. *Held*, that for want of certainty no use was reated: *Anon.* (1582), Moore, 122.

Tenant in tail, for considerations sufficient to raise a use, ovenanted that after his own death the lands should remain to ıe use of his son John and the heirs male of his body, and fterwards his wife died and the tenant in tail married again and ied; in an action by the widow for dower it was held that no use as raised by the covenant: *Blytheman* v. *Blytheman* (1592), And. 291, ca. ccxcix; Cro. Eliz. 280.

Covenant by a man seised of land, on the marriage of his son, hat the land shall after his death remain and be to his son and is intended wife and the heirs of the son, to the use of the son nd his intended wife and to the heirs of the son. *Held*, no use: *Buckley* v. *Simonds* (1622), Winch. 59; *S. C. sub nom. Buckler* v. *ymons*, 22 Viner, p. 211, Uses (O. 4), pl. 1; 2 Roll. Abr. 788.

Covenant, bargain and sale for value (not enrolled) by Margaret

Foster that her eldest son should have certain land. *Held*, t the son took no estate for the deed could not operate by way of u " for the intent of the parties appears on the face of the deed t it should not operate by way of use, and this is the common r that a use cannot arise against the intent of the parties, as that the great director of uses " : *Foster* v. *Foster* (1662), Sidf. 1 Lev. 55; Sir Thos. Raym. 43; 1 Keb. 160, 225, 274.

There was at one time a doctrine that deeds to uses were to construed differently from common law conveyances : see 1 Sande Uses, c. 2, s. 4, pp. 122 *et seq.* (5th ed.), and the cases there cit See however the remarks of Lord Hardwicke in *Rigden* v. *Val* (1751), 2 Ves. Sen. 253, at p. 257. Such doctrine has been lo since abandoned; 4 Cruise Dig. tit. xxxii, c. 19, ss. 62 *et seq.*

Transmutation of use into seisin.

Where a deed contains a declaration of uses, t legal seisin is, under the Statute of Uses, tra ferred from the grantee to the person who has t use for the estate mentioned in the use.

" Where any person or persons . . . shall happen to be sei of and in any . . . hereditaments to the use, confidence, or tr of any other person or persons . . . in every such case . . . s person and persons that have . . . any such use, confidence, trust shall from henceforth stand and be seised deemed a adjudged in lawful seisin, estate and possession of and in the sa . . . hereditaments . . . of and in such like estates as they had shall have in use, trust, or confidence of or in the same, and that estate, right, title and possession that was in such person or pers that . . . shall be seised of any . . . hereditaments to the u confidence, or trust of any such person or persons . . . be fr henceforth clearly deemed or adjudged to be in him or them t . . . hereafter shall have such use, confidence, or trust after s quality, manner, form, and condition as they had before in or to use, confidence, or trust that was in them " : 27 Hen. 8 (15 c. 10, s. 1.

The *cestui que use* of course has such estate only as is limited him under the uses, for the Statute so provides; but further, in much as the use is fed out of the estate of the grantee to uses follows that—

Cestui que use cannot have greater estate than grantee.

Where the grantee to uses and *cestui que* are not the same person, and the estate of grantee to uses is less than the estate declared

the uses, the latter will determine with the former : 1 Sand. Uses, ch. 2, s. 2 (5), p. 107 (5th ed.).

"Where an estate is limited to one, and the use to a stranger, ıere the use shall not be more than the estate out of which it is erived" : *Jenkins* v. *Young* (1631), Cro. Car. 230; Sir Wm. Jones, 53; *Meredith* v. *Joans* (1631), Cro. Car. 244.

Land given to two, habendum to them for the term of their lives ıd that of the longer liver of them, to the use of A for the term his life. *Held*, that the estate of A determined on the death of ıe survivor of the two : Shep. Touch. 106; *Anon.* (1560), Dy. 36 a, pl. 1.

The rule does not apply where the grantee to uses is also the *estui que use.*

If *cestui que use* same as grantee he has the estate limited in the uses.

Gift of land to husband and wife, habendum to husband and ife to the use of them and the heirs of their bodies. *Held*, that ıey took an estate tail, on the ground that it was not a use xecuted by the Statute, in which case the estate given by the use ould not be more than the estate out of which it was derived, but as a limitation of the estate to them and the heirs of their two odies, and they were in by the common law : *Jenkins* v. *Young* 1631), Cro. Car. 230; Sir W. Jones 253, pl. 3; *S. C. sub nom. Meredith* v. *Joans*, Cro. Car. 244; see also *Younge* v. *Dymock* 1631), Dy. 186, a, pl. 1, note.

There is some difference of opinion as to whether, where a mitation is made in tail to uses, the uses will take effect or not.

Limitation in tail to uses.

The learning on this question, which is now of but little importnce, will be found in Co. Litt. 19 b; Shep. Touch. 516; Bac. Law racts (8vo ed. 1737), p. 347; 1 Sand. Uses, ch. 1, s. 6 (2), . 28, and ch. 2, s. 2 (1), p. 87 (5th ed.); Jenk. 195; 1 Cruise, 50; 2 Prest. Conv. 265; *Cromwell's Case* (1601), 2 Rep. 69 a, at . 78 a; *Cowper, Cooper* or *Carier* v. *Frankline, Franklin, Franlin,* r *Frankling*, or *Franklin's Case* (1616), 3 Buls. 184; Cro. Jac. 00; 1 Roll. Rep. 332, 384; Moore, 848; Godb. 269; Viner, Uses, , pl. (2), pl. (3). The analogous question as to what is the effect f a covenant by tenant in tail to stand seised to uses is discussed ı *Machil, Machel* or *Machell* v. *Clerk* or *Clarke* (1702), 7 Mod. 18; 1 Mod. 19; Ld. Raym. 778; Holt, 615; 2 Salk. 619, Com. Rep. 19; and the cases there referred to.

Where in a conveyance at common law to A, uses are declared on A's seisin in favour of A himself, A is in by the common law, not by the Statute of Uses, unless the estate declared in A's favour by the uses is less than that which A takes

If grantee and *cestui que use* the same person he is in by common law unless he takes a smaller estate by the uses.

at common law; in which case the uses are execut by the statute: Sand. Uses, ch. 2, s. 2 (2), pp. *et seq.* (5th ed.); Bac. Law Tracts, p. 351 (8 ed. 1737).

Examples where the estates were the same.

Fine levied with declaration of use to the conusee and his he *Held*, that he was in at common law, not by the Statute: *Long Buckeridge* (1718), 1 Stra. 106; and *per* Holt, C.J., *Altham Anglesey* (1709), Gilb. Eq. 16; *S. C. sub nom. Anglesey* v. *Altha* 2 Salk. 676.

A, B, and C, being tenants in common in tail, B released A and C and their heirs his share, habendum to them, their he and assigns, as tenants in common, and not as joint tenants, to use of them, their heirs and assigns. It was admitted that thou if the use had been executed by the Statute, they would have be joint tenants, yet, as they were in at common law, they took tenants in common: *Doe* v. *Prestwidge* (1815), 4 M. & S. 17 16 R. R. 436.

M, a tenant in tail in possession of real estate, executed a de inrolled as a disentailing assurance, by which he granted it to and B and their heirs, free from all his estates tail, to the use A and B and their heirs, in trust for the grantor. A and B not execute the deed, and subsequently executed a disclaim *Held*, that the disentailing deed operated at common law, not un the Statute, and therefore was rendered inoperative by the d claimer: *Peacock* v. *Eastland* (1870), L. R. 10 Eq. 17; 39 L. Ch. 534.

A, seised in fee, by indenture grants a rentcharge to "B, D, and their heirs," habendum "unto the said B, C, and D, th heirs and assigns, to the use of the said B, C, and D, their he and assigns for ever, as tenants in common and in equal share *Held*, that the use being specific, and not inconsistent with habendum, the whole habendum must be read as specific, a so read, the deed operated as a grant at common law, not un the Statute of Uses. Grove, J., said "If the estate is changed use is executed by the Statute; if the estate is the same, the gr takes effect by the common law": *Orme's Case* (1872), L. 8 C. P. 281 (at p. 289).

In a conveyance by a vendor of freehold lands unto and the use of a purchaser in fee simple there were added the follow words: "except and reserving unto the vendor a piece of la not less than forty feet in width commencing at the level-cross over the railway at the point A marked on the said plan (*sc.* the conveyance) and terminating at the nearest road to be ma

the purchaser or his assignee on the estate so as to give access such roads from " other lands belonging to the vendor. There is no attempt to define the excepted land either by way of undaries or colour so as to distinguish it from the rest of the nd described in the conveyance and plan. *Held* (*inter alia*) at the conveyance operated not by virtue of the Statute of Uses, t by the common law, and that therefore the " forty feet " ece purported to have been so defined was not effectually cepted from the conveyance: *Savill Brothers, Ltd.* v. *Bethell*, 902] 2 Ch. 523; 71 L. J. Ch. 652.

Grant " unto and to the use of A in fee simple," " a conyance in such a form as this has been repeatedly held to operate common law and not under the Statute of Uses " : *per* Stirling, J., *Savill Brothers, Ltd.* v. *Bethell* (*supra*), at p. 540; 71 J. Ch., at p. 659.

Examples where the estates were different.

Feoffment in consideration of a sum paid by the feoffees, bendum to the feoffees and their heirs for ever, to the use of the offees for ever; with a clause of warranty to the feoffees, their irs and assigns *in forma praedicta*. *Held*, that they took for life ly: *Wilkes* v. *Leuson* (1559), Dy. 169 a, pl. 21.

Release by freeholder to a copyholder " unto the said J S, habenm unto J S and G S, their heirs and assigns, to the use of J S and S, their heirs and assigns for ever." *Held*, that though, as G S s not named in the premises, he could take nothing in the habenm, yet the use limited to J S and G S and their heirs is good: *mmes' Case* (1609), 13 Rep. 54; Ley, 11. And it was said, *ibid.*, p. 56, " if a man maketh a feoffment in fee to one, to the use him and the heirs of his body; in this case, for the benefit of e issue, the Statute according to the limitation of the uses, divests e estate vested in him by the common law, and executes the same himself by force of the Statute, and yet the same is out of the rds of the Statute of 27 Hen. 8, which are, where any person, ., stand or be seised, etc., to the use of any other person; and re he is seised to the use of himself; and the other clause is, ere divers and many persons, etc., be jointly seised, etc., to the of any of them, etc.; and in this case A is sole seised: but the tute of 27 Hen. 8 hath been always beneficially expounded, to isfy the intention of the parties, which is the direction of the according to the rule of the law. So if a man, seised of lands fee simple, by deed covenants with another, that he and his heirs stand seised of the same land, to the use of himself and the rs of his body, or unto the use of himself for life, the remainder r in fee; in that case, by the operation of the Statute, the ate which he hath at the common law is divested, and a new ate vested in himself, according to the limitation of the use ":

see also *Watts* v. *Ognell* (1607), Cro. Jac. 192; Noy, 124; *Read* v. *Norris* (1600), Dy. 200 a, note.

Fine levied to the use of C and his heirs till a marriage sho take effect, and then to the use of the wife, remainder to the use the conusees and their heirs during the life of C, in trust to prese contingent remainders, and that they should permit him to rece the profits, then to the use of C's first and other sons by a cert wife in tail, then to the use of the heirs male of C's body w remainders over. *Held*, that the conusees took by the Statute Uses, " because the limitation of the use is different from the est of the land, as where a feoffment is made to the use of feoffee for life, remainder to J S, the feoffee is in by the Statu Feoffment to A and his heirs, to the use of A and B, and heirs, they are joint tenants; the difference is that where the fee simple of the use is limited to him who hath the estate in land, he is in by the common law, as in the case Inst. 22 where a feoffment is to the use of the feoffor in tail, and after the use of the feoffee in fee " : *Tipping* or *Tippin* v. *Cosins*, *Co Cozens* or *Coson* (1694), Comb. 312; Carth. 272; 4 Mod. 380; H 731; 1 Ld. Raym. 33.

The Statute of Uses only operates to transmute one use int legal estate. All uses declared upon the first use, other than re issuing thereout, are equitable estates or trusts.

This proposition is often compendiously, though somew inaccurately, expressed in the words—

No use on a use.

> A use cannot be limited on a use : 1 Sand. U ch. 2, s. 8 (6), p. 275 (5th ed.).

The proposition is applied even where the first use is in fav of the grantee himself, for although he is in by the comm law and not by the Statute, " he is in of the estate clot with the use, which is not extinguished, but remains in him " : Bayley, J., *Doe* v. *Passingham* (1827), 6 B. & C. 305, at p. 3 5 L. J. (o.s.) K. B. 146; 30 R. R. 327; and " they take that se to the use of themselves, and not to use of another, in which alone the use is executed by the Statute " : *per* Holroyd, J., *ib* at p. 316 (6 B. & C.).

One infeoffed his two sons to the use of himself for life, afte the use of them and their heirs *ad ultimam voluntatem suam per plendam*, and afterwards devised in fee. *Held*, at law, that devisee should not have the land, because a use cannot be lim on a use, so that, " when he limits it to the use of his sons their heirs, he cannot afterwards limit it to the uses of his will " : *Girland* v. *Sharp* (1595), Cro. Eliz. 382.

By marriage settlement lands were conveyed to trustees

ıeir heirs to the use of them and their heirs to the use of the usband for life, remainder to the use, etc. *Held*, that the use and gal estate were vested in the trustees, and the limitations to the usband, etc., were but trusts: *Lady Whetstone* v. *Saintsbury* 1723), 2 P. Wms. 146.

Conveyance by lease and release to W and E and their heirs, ıbendum unto W and E, their heirs and assigns, to the use of W ıd E, their heirs and assigns, to the uses, etc. *Held*, that W ıd E took the legal estate, and that the uses following gave quitable interests only: *Doe* v. *Passingham* (*supra*), p. 402.

Inasmuch as a grantee under a bargain and sale only gets the isin by virtue of the Statute of Uses, it follows that all uses eclared by such an instrument are equitable estates or trusts, the peration of the Statute being exhausted in conferring a legal estate ı the bargainee: Shep. Touch., p. 510.

No uses under bargains and sales.

Bargain and sale for value enrolled, "to G, habendum to G and s heirs, to the use of J for life, remainder to the use of G and ıe heirs of his body, remainder to the use of the heirs of J." *eld*, that the limitation of uses was void at law: *Tyrrel's Case* 557), 2 Dy. 155 a, pl. 20.

Where land is limited to the use of A and his heirs, yielding a nt to B and his heirs, the rent is well created by way of use ıder the Statute: *Lord Cromwell's Case* (1601), 2 Rep. 69 a.

To use of A, yielding rent to B.

"It is quite true no use in the law can be created after a use. ı a conveyance to A and his heirs to the use of A and his heirs ıe Statute operates upon the use and exhausts its operation, and l beneficial estates in the land itself declared upon such a seisin e equitable estates or trusts; but this is not so with a rent, it is new estate. It is fed out of the seisin of A and his heirs, and is legal estate by virtue of the Statute of Uses. It is precisely the me case as a rent declared out of the estate of the bargainee upon bargain and sale. He is seised by virtue of the Statute, the use himself is the first use, and any beneficial estate declared upon s seisin is a trust: Shep. Touch., p. 510; but a rent may be eclared out of his estate and will not be deemed a use upon a se: Lord St. Leonard's Note to Gilbert on Uses, p. 347": *per* artin, B., *Gilbertson* v. *Richards* (1859), 4 H. & N. 277, at 297. The case was affirmed on appeal (1860), 5 H. & N. 453.

1. The Statute of Uses was originally repealed by section 1, b-section 7 of the Law of Property Act, 1922, together with ction 62 of the Conveyancing Act, 1881, which related to grants easements, etc., by way of use. The repealing section of the 22 Act is not re-enacted by the Law of Property Act, 1925 (*a*),

New Law.

(*a*) See the Law of Property Act, 1925, 7th Schedule, for the repeal of the atute of Uses under that Act.

New Law.

but section 1, sub-section 9 of that Act enacts that "provision any statute or other instrument requiring land to be conveyed uses shall take effect as directions that the land shall (subject creating or reserving thereout any legal estate authorised by Act which may be required) be conveyed to a person of full upon the requisite trusts.

As regards dealings taking effect before 1926 the Statute Uses is still applicable : section 1, sub-section 10.

2. Section 4, sub-section 1 of the Law of Property Act, 19 enacts (*inter alia*) that "save as otherwise expressly provided statute, interests in land which under the Statute of Uses otherwise could before the commencement of this Act have b created as legal interests, shall be capable of being created equitable interests :

Provided that, after the commencement of this Act (and s as hereinafter expressly enacted), an equitable interest in l shall only be capable of being validly created in any case in wh an equivalent equitable interest in property real or personal co have been validly created before such commencement."

3. By way of compensation for the repeal of the Statute Uses and of section 62 of the Conveyancing Act, 1881, it is provi by section 65 of the Law of Property Act, 1925 (*inter alia*), t "a reservation of a legal estate shall operate at law without execution of the conveyance by the grantee of the legal est out of which the reservation is made, or any regrant by him as to create the legal estate reserved, and so as to vest the s in possession in the person (whether being the grantor or for whose benefit the reservation is made." The section applies to reservations made after 1925.

4. The repeal of the Statute of Uses has rendered neces section 66 of the Law of Property Act, 1925, which gives estate owner the power to confirm past transactions which p to 1926 necessitated recourse for their confirmation to the Sta of Uses. The section applies only to deeds executed after 192

5. Finally, section 72, sub-section 3 of the Law of Prop Act, 1925, enables a person after 1925 to convey land or land in himself. Prior to 1926, in the case of freeholds, interposition of a grantee to uses was necessary.

The Statute of Uses, moreover, does not transmute all prim uses into legal estates, even if the words *use, confidence or tr* which are the words used in the Statute of Uses, or any of th are or is used, for—

Grantees take legal estate, if they

Where the legal estate is vested at common in trustees, on trusts for the benefit of anot

which require the active performance by them of some duties, such as to pay the rents and profits to another, to pay debts, to keep in repair, or the like, they retain the legal estate; but, on the other hand, if they have no active duties to perform, but merely to allow another to receive the rents and profits, that other takes the legal estate: see Shep. Touch. 506, 527; Lewin on Trusts, c. 12, s. 1, p. 234 (12th ed.).

have duties to perform.

Feoffment in fee to the use of the feoffor for life, and after his ecease that A should take the profits; the use is executed in A. ut, on the contrary, if he said that after his death the feoffees ıould receive the profits and pay them to A, the use would not e executed in A, because he could only have the profits by the ands of the feoffees: Bro. Abr., *Feffements al Uses*, 340, pl. 52, ting Y. B. 36 Hen. 8 (1544), but the case has not been traced. ee also *Spencer* v. *Registrar of Titles*, [1906] A. C. 503, at p. 507; 5 L. J. P. C., at p. 102.

Conveyance in a marriage settlement to R and J and their heirs pon the trusts and for the uses, etc., that is to say, in trust for P the intended husband) and his heirs till the marriage, and then in ·ust to permit and suffer M (the intended wife) and her assigns uring her life, and notwithstanding her coverture, to receive and ıke the issues and profits thereof to and for her and their own sole nd separate use free from the debts, control, and engagements of ', and her receipts alone notwithstanding coverture to be good nd sufficient discharges for the same, and after her death in trust or P and his assigns for life, and after the death of the survivor, ı trust for the children of P by M as they should appoint. P and I appoint to such uses as their son F should appoint; F appoints ıe remainder in fee. *Held*, on ejectment after the deaths of P nd M, that all the estates of the beneficiaries under the settleıent, with the possible exception of that of M, were legal: *Nash* . *Ash* (1862), 1 H. & C.160; 32 L. J. Ex. 165; 130 R. R. 438.

Limitations to separate use of married woman.

In the case last cited it was not necessary to determine the ature of the estate of the wife, but the following case shows the istinction between a mere trust for the separate use of a married oman during her life, which gives her the legal estate, and a ·ust to pay the rents to her for her separate use during her life, hich leaves the legal estate in the trustees.

Conveyance by settlement (lease and release) on marriage to ·ustees and their heirs to the use of A, the intended wife, her eirs and assigns till the marriage, and afterwards in trust for

A and her assigns during her life, for her own sole and sepa use independent of the intended husband, his debts, control, engagements, with remainders over. *Held*, that the wife took legal estate. Parke, B., said, " We cannot collect clearly, from words of the deed, that they intended to give the trustees an *ac trust*, to exclude the husband from control, by giving the estat the trustees in order to pay over the rents and profits to the w The limitation to her sole and separate use is therefore void at l and the use is executed in the wife although the husband i trustee for her in equity " : *Williams* v. *Waters* (1845), 14 M. & 166, at p. 173. See the remarks on this case in Williams Settlements, 53.

"Pay to *or* permit to receive."

There does not seem to be any case on a deed where the t was " to pay unto A *or* permit and suffer A to receive " the re In *Doe* v. *Biggs* (1809), 2 Taunt. 109; 11 R. R. 533, where th words occurred in a will, it was held that they gave the legal es to the *cestui que trust*, on the ground that the words " permit suffer " followed the words " to pay unto," and that where ther a repugnancy, the first words in a deed, and the last words i will, prevail. See also *Baker* v. *White* (1875), L. R. 20 Eq. 1 44 L. J. Ch. 651; and *Re Adams and Perry's Contract*, [1899 Ch. 554; 68 L. J. Ch. 259. If this reasoning holds good, th words occurring in a deed would leave the legal estate in trustees.

" Where the trust is ' to pay unto or permit and suffer a pe to receive ' the rents, as the former words would create a spe trust and the latter would be construed a use executed by statute, the Court holds, for want of a better reason, that former or latter words shall prevail, as the instrument in wh they are found happens to be a deed or a will " : Lewin on Tru c. 12, s. 1 (7), p. 236 (12th ed.). But all the cases cited are c on wills.

Legal estate of trustees not enlarged or diminished by nature of trusts.

The legal estate limited to trustees will not enlarged or diminished by the circumstance that nature of the trusts requires a larger, or would satisfied by a smaller, estate.

The uses of a fine were declared to be to the use of S for remainder to the use of L and E and their heirs during the lif S, in trust to support contingent remainders, remainder to the of H for life, remainder to the use of L and E and their heirs trust to support contingent remainders, with remainders ove tail, with remainder to such uses as H should appoint. *H* that the second limitation to L and E gave them an estate in

mple : *Venables* v. *Morris* (1797), 7 T. R. 342, 438; 4 R. R. 455; nd see the remarks of Lord Kenyon, C.J., in *Doe* v. *Hicks* (1797), T. R. 433, at p. 437, where he says that it was necessary hat the fee should be in the trustees so as to support any contingent emainders limited under the power; and Sir William Grant in *urtis* v. *Price* (1805), 12 Ves. 89, at p. 100; 8 R. R. 303, seems to ave adopted the same view, but " in *Wykham* v. *Wykham* (1811), 8 Ves. 395, at p. 422, Lord Eldon scarcely seems to agree with ir William Grant in that view of *Venables* v. *Morris* " *per* Vood, V.-C., *Lewis* v. *Rees* (1856), 3 K. & J. 132, at p. 139, and ee p. 142; 26 L. J. Ch., at p. 104; 112 R. R. 74.

The uses of a recovery were declared to be to the use of trustees, heir heirs and assigns, during the life of S, in trust to pay the ents as she should, notwithstanding coverture, appoint, with emainder to the use of her children as she should appoint, and in efault to the use of the children as tenants in common in tail vith cross remainders. *Held*, that the estate *pur autre vie* of the rustees could not be considered as commensurate with the limitaions of the settlement. Heath, J., said, " There is a distinction etween limitations by settlement and limitations by will; in the atter case they are construed according to the intention of the estator, and then the trustees, under a limitation of this sort, night be considered as having an estate commensurate with the ubsequent limitations; but that mode of construction cannot be pplied to a limitation by settlement " : *Blaker* v. *Anscombe* (1804), Bos. & Pul. N. R. 25; 8 R. R. 746. See also *Re Monckton's Settlement*, [1913] 2 Ch. 636; 83 L. J. Ch. 34.

Power in a will for tenants for life to appoint to trustees, upon rust to raise and pay a jointure. The tenant for life by deed ppointed to trustees to hold to them and their heirs, upon trust o raise and pay the jointure. The Court of King's Bench certified, n a case sent from Chancery, that the trustees took an estate in ee simple : *Wykham* v. *Wykham* (1809), 11 East, 458. The Court f Common Pleas was of opinion that the trustees took no estate : *Wykham* v. *Wykham* (1810), 3 Taunt. 316. *Held*, by the Court of Chancery, that they took an estate in fee simple : *Wykham* v. *Wykham* (1811), 18 Ves. 395. Lord Eldon, C., said (at p. 420), ' If you look to the executing instrument itself, it purports to be a rant in fee; and it is a deed. It purports to be a grant in fee for urposes certainly not requiring a fee, but still it purports to be a rant in fee; and it is, I think, difficult to maintain that, if a man oes more, by using words which have a legal effect, than is necesary to execute the purpose he professes to execute, the circumstance hat he uses those words of larger legal effect than is required, and is purpose, shall cut down the legal effect of the words in a deed."

Conveyance in marriage settlement to B and his heirs, to t uses following, that is to say, to the use of C for life, remainc to the use of his widow for life, remainder (in the events th happened) to the use of B, his heirs and assigns, on trust to ta the rents and pay them to M for life for her separate use, remainc as M shall by will appoint; in default to the use of the heirs a assigns of M. *Held*, that nothing in the deed cut down the le estate in fee given to B : *Cooper* v. *Kynock* (1872), L. R. 7 Ch. 39 41 L. J. Ch. 296.

Exception.

To the last stated rule, however, there is one exception, viz.

Limitation to trustees and their heirs cut down by limitation to them of term.

> Where there is a limitation to trustees and th heirs generally, and the object of that limitati ceases with the life of the tenant for life, and the is a subsequent limitation to the same trustees o term, inasmuch as they cannot take the term if th take an estate in fee simple absolute by the form limitation, such limitation will be cut down to estate *pur autre vie*.

Examples.

Conveyance to P and J and their heirs, to the use of M for l remainder to the use of E if she continued unmarried, but if should marry, to the use of P and J and their heirs, on trust of the rents to pay an annuity to E during her life, and with rest of the rents and profits to maintain the children of M and remainder after the several deceases of M and E, to the use P and J, their executors, etc., for 100 years, remainders ov *Held*, that the estate in fee in P and J must be cut down to estate during the life of E, as the subsequent limitation of a te to them was inconsistent with their taking an estate in fee sim absolute : *Curtis* v. *Price* (*supra*), p. 407 (see *per* Wood, V.- *Lewis* v. *Rees* (1856), 3 K. & J. 132, at pp. 145, 148).

Limitation to the use of W for life, remainder to the use N and B and their heirs, on trust to preserve, remainder to use of R for life, remainder to the use of N and B, their execut etc., for the term of 500 years, remainder to the use of J for l remainder to the use of N and B and their heirs during the of J, with remainders over. *Held*, that the estate limited to trustees in fee must be cut down to an estate *pur autre* during the life of W : *Beaumont* v. *Marquis of Salisbury* (18 19 Beav. 198; 24 L. J. Ch. 94; 105 R. R. 115.

"Trustees and their heirs" to preserve.

An attempt has been made to extend this exception to all ca where there is a limitation to trustees and their heirs generally trust to preserve contingent remainders and in a subsequent p

f the deed there is any other limitation to the same trustees; but uch attempt has not prevailed, apparently on the ground that here is no such inconsistency in repeating the limitation of an state in fee simple as to render it clear that the words could not ear their ordinary meaning : *Colmore* v. *Tyndall* (1828), 2 Y. & J. 05; 31 R. R. 637; *Lewis* v. *Rees* (1856), 3 K. & J. 132.

New Law.

The foregoing rules as to the estate taken by trustees as gathered rom the construction of documents seem to be of little or no pplication under the new law. This would appear to be so if only y reason of the drastic curtailment of legal estates by the new cts. Such questions as to whether the trustees took estates commensurate with subsequent limitations will, it is submitted, be xtremely unlikely to arise, if not incapable of arising in future nder the new Acts.

CHAPTER XX.

RESULTING USES AND TRUSTS—ESTATES BY IMPLICATION

Reversion in Grantor: Resulting Uses to Grantor: Differe between Limitations in Remainder to Heirs Special and to H General of Grantor: Resulting Trusts: No resulting Use Trust for Person other than Grantor: Cross Remainders implied: "Share": "Survivors" read "others."

"By the rules of the common law applicable to deeds, no int tion will be presumed unless it is expressed: and consequently estate will arise unless there be a limitation to pass that estate 1 Preston, Est. 190, citing *Gardner* v. *Sheldon* (1672), Vaugh. 2 at p. 261; and *per* Twysden, J., *Pybus* v. *Mitford* (1673), 2 L 75, at p. 79. See, however, *Re Stanley's Settlement* (p. 4 *infra*).

Reversion in grantor.

Where A, seised in fee, creates a particu estate by a conveyance operating at common la the reversion of the fee simple remains in A: C Litt. 22 b.

On conveyance of fee no resulting use to grantor, if consideration given, but resulting use to grantor if no consideration given, except so far as uses declared.

Where A, seised in fee, conveys the whole simple by a conveyance operating at common la for a good or valuable consideration, there is resulting use to A, even if no uses are declared; b where A conveys the whole fee simple by conveyance operating at common law, withc consideration, there is a resulting use to him in simple, unless uses are declared: *Beckwith's C* (1589), 2 Rep. 56 b, at p. 58 a; Moore, 19 *Armstrong* v. *Wolsey* (1755), 2 Wils. 19.

New Law.

The Statute of Uses having been repealed by the Law Property Act, 1925, as regards dealings after 1925, this and succeeding rules relative to resulting uses are of diminish importance.

The latter part of this rule was different as to a conveya before the Statute of *Quia Emptores*, 18 Edw. 1 (1289), c.

lers v. *Beamont* (1556), Dyer, 146 a, at p. 146 b, pl. 71; and is ferent as to a conveyance in tail or for life at any time, as the ıancy created, formed prior to that Statute with regard to the , and still forms with regard to the particular estate, a sufficient ısideration : Shep. Touch. 522; Vin. Abr. tit. Uses, F. 5 and 6, l. 22, p. 188; *Villers* v. *Beamont* (1556), Dyer 146 a, at 146 b, pl. 71.

A nominal consideration is sufficient to prevent a resulting use : *rter's Case* (1592), 1 Rep. 22 b, at p. 24 a. Nominal consideration.

The consideration in a lease is sufficient to support the release : *ortridge* v. *Lamplugh* (1702), Holt, 621; 2 Salk. 678; 3 Salk. 387; Ld. Raym. 798; 7 Mod. 71.

Where A conveys the whole fee simple by a conveyance operating at common law, whether there is consideration or not, and uses are declared which do not exhaust the fee or fail, there is a resulting use to A of so much of the estate as the uses do not dispose of effectually : Co. Litt. 23 a, 271 a, b; Fearne, C. R. 41, 42; *Audley's Case* (1559), Dyer, 166 a; 4 Leon. 166, 210; *Woodliff* v. *Drury* (1594), Cro. Eliz. 439. Resulting use to grantor of uses not disposed of.

If the grantor is seised *ex parte materna*, the resulting use is of e same nature : Shep. Touch. 522; Y. B. 5 Edw. 4 (1465), 7, . 16, cited in *Beckwith's Case* (1589), 2 Rep. 56 b, at p. 58 a, and *Chudleigh's Case* (1588—95), 1 Rep. 120 a, at p. 127 a, b.

If the *cestui que use* of a particular estate disclaims, the mainders are accelerated, unless the uses arise on a covenant to and seised, when there is a resulting use to the covenantor : *ord Paget's Case* (1591), 1 And. 259, 263; Moore, 193; 1 Leon. 4, cited in *Rector of Chedington's Case* (1598), 1 Rep. 153 a, at 154 a, b. If use disclaimed.

The text is taken from Coke, who cites *Lord Paget's Case* as his ıthority, but the report in Anderson is not to the same effect as, d the report in Moore is directly contrary to, the citation. It is ıpossible to discover from the report in Leonard what the decision as.

One particular instance of the foregoing rule is of sufficient ıportance, having regard to the rule in *Shelley's Case* [*abolished section* 131 *of the Law of Property Act*, 1925] to be stated in e rule following :—

"Where a use is limited which cannot commence till after the grantor's decease, and either Resulting use to grantor for life.

no use is limited to take effect in the granto
lifetime, or, uses being limited, they are not co
mensurate with the grantor's life, the freehold v
result to him, unless an express use be limited
him inconsistent with such an implication
Butler's note to Fearne, C. R. 41.

The rule is so fully discussed in Fearne, C. R. 41 *et seq.*, tha
is unnecessary to discuss it here. The cases cited by Fearne a
Pibus, *Pybus* or *Bipus* v. *Mitford* or *Milford* (1674), 1 Vent. 3
2 Lev. 75; 1 Mod. 98, 121, 159; 3 Keb. 129, 239, 316, 3
Sir Thos. Raym. 228; Freem. K. B. 351, 369; *Penhay* v. *Hur*
(1699), 2 Vern. 370; 2 Freem. 213, 231, 235, 258; *Adams* v. *T*
tenants of Savage (1703), 2 Salk. 679; 2 Ld. Raym. 854; *Rawley*
Holland (1712), 22 Vin. Ab. 189, pl. 11; 2 Eq. Ca. Ab. 753; *Tip*
or *Tipping* v. *Cosin*, *Coson*, *Cosins*, or *Cozens* (1693), Carth. 2
4 Mod. 380; Holt, 731; Comb. 312; 1 Ld. Raym. 33; *Else* or *Elie*
Osborn (1717), 1 P. Wms. 387; 2 Vern. 754; *Southcot*, *Southc*
or *Southcott* v. *Stowell* or *Stowel* (1676), 1 Mod. 226, 237; 2 M
207; Freem. K. B. 216, 225; 3 Keb. 704; *Wills* v. *Palmer* (177
5 Burr. 2615; 2 Wm. Bl. 687. Mr. Fearne adds that this r
flows from the rule laid down by Coke (Co. Litt. 23 a), that i
conveyance to uses without valuable consideration so much of
use as is undisposed of results to the grantor.

There is some difficulty in seeing what becomes of the freeh
in cases like *Bedford* v. *Russell*, or *The Earl of Bedford's C*
(1592), Pop. 3; Moore, 718; 2 Anders. 197; cited in *Chudleig*
Case (1589-95), 1 Rep. 120 a, at p. 130 a; *Godbold* v. *Freest*
(1694), 3 Lev. 406; *Adams* v. *Tertenants of Savage* (1703), 2 Sa
679; 2 Ld. Raym. 854; *Rawley* v. *Holland* (1712), 22 Vin. 1
pl. 11; 2 Eq. Ca. Ab. 753, where the first use was to the gran
himself for ninety-nine years, and it was held that there was
resulting use to him, notwithstanding that the use was not limi
away from him during all his life. See 1 Law Quar. Review, p. 4

Only applies where grantor seised in fee.

The rule is stated as laid down in the notes to Fearne, bu
should be observed that it is only true if the grantor be seised
fee, and that if he be tenant for life, the use undisposed of will
result to him: *Castle* v. *Dod* (1607), Cro. Jac. 200, where i
stated that the fact that the grantee becomes liable to the anci
rent and forfeiture is sufficient consideration to vest the use in h

But if a tenant *pur autre vie* conveys his estate to trustees u
trusts which fail, there is a resulting trust for him and the origi
special occupant, if any: *Northen* v. *Carnegie* (1859), 4 Drew. 58

Difference between

In connection with this subject, Fearne points out (C. R. 51)
difference "between a subsequent limitation to the use of the h

ecial and one to the use of the heirs general, in cases where the eehold is limited away from the grantor during his life; the tter . . . leaves the old use in himself by way of reversion" (it ould be otherwise in limitations contained in deeds after 1833: & 4 Will. 4 (1834), c. 106, s. 3), "but the former is a contingent mainder to his heirs special—that is, where the limitation is by ay of use; for by a conveyance at common law the limitation the heirs special of the grantor would be void; because a donor nnot make his own heir a purchaser, even of an estate tail, ithout departing with the whole fee."

remainder to heirs general and heirs special of grantor.

Where a declaration of the trusts of property vested in trustees does not exhaust all the interest vested in them, there is a resulting trust of the undisposed of interest to the settlor.

Resulting trusts of property vested in trustees.

The authorities for this proposition are: *Langham* v. *Nenny* 1797), 3 Ves. 467; *Campbell* v. *Prescott* (1808), 15 Ves. 500; *awkins* v. *Hawkins* (1834), 7 Sim. 173; 4 L. J. Ch. 9; 40 R. R. 2; *Wilson* v. *Paul* (1836), 7 Sim. 620; *Pringle* v. *Pringle* (1856), 2 Beav. 631; 111 R. R. 513; *Anon.* (1858), 1 Giff. 392; 114 R. R. 30; *Wollaston* v. *Berkeley* (1876), 2 Ch. D. 213; 45 L. J. Ch. 72; *Upton* v. *Brown* (1879), 12 Ch. D. 872; 48 L. J. Ch. 756; *lara* v. *Browne*, [1895] 2 Ch. 69; 64 L. J. Ch. 594.

Where upon the natural and true construction of a deed hereby partners in a business assigned to trustees the property nd business of the firm upon certain trusts for the benefit of ne firm's creditors, there was an absolute disposal of all the roceeds to be realised for the benefit of such creditors. *Held*, nat there was no resulting trust by implication in favour of ne assignors: *Smith* v. *Cooke*, [1891] A. C. 297; 60 L. J. h. 607.

Where, however, funds were settled upon trust for the wife for fe, and after her death for the husband until bankruptcy, alienaon or death, which should first happen, and after the decease of ne survivor of the wife and husband, for the children; the husband ecame a liquidating debtor in the wife's life; the wife subsequently ied; it was held that the income of the fund between the wife's eath and the husband's death belonged to the children. None of ne cases on deeds was referred to: *Re Akeroyd's Settlement*, 1893] 3 Ch. 363.

If the interests which are undisposed of are interests in the roceeds of sale of land directed to be sold by the deed, the settlor akes such interests as personalty and not as land, even if the sale

Whether results as realty or personalty.

is not to be made during his life : *Hewitt* v. *Wright* (1780), 1 Br C. C. 86; *Clarke* v. *Franklin* (1858), 4 K. & J. 257; 27 L. J. C 567; 116 R. R. 325; but if all the purposes of the deed fail, t land itself results to the settlor as land : *per* Lord Eldon, *Ripley* v. *Waterworth* (1802), 7 Ves. 425, at p. 435; *per* Woo V.-C., *Clarke* v. *Franklin* (*supra*), at p. 265.

Immediate conversion, though trust for sale be "with consent of" or "at request of" tenant for life.

"In my opinion, notwithstanding the *dictum* in *Att.-Gen.* *Dodd* ([1894] 2 Q. B. 150, 153; 63 L. J. Q. B. 319), there no distinction between the words 'with the consent of' or ' the request of' when applied to a tenant for life under a sett ment, and in neither case does their introduction prevent a tru for sale from being imperative : see *Lechmere* v. *Earl of Carlis* 3 P. Wms. 211, 219. . . . I hold, therefore, in the present ca that conversion of the real estate into personalty took place fro the date of the deed" : *per* Neville, J., in *Re Ffennell's Sett ment*, [1918] 1 Ch. 91, at p. 98; 87 L. J. Ch. 54.

Whether realty vested in trustees on an imperative trust for sale results as realty or personalty.

"Where in the case of land directed to be sold the legal esta is outstanding in trustees for sale, it appears to me that t property cannot be said to be 'at home' merely because t settlor at his death was the only person beneficially interested the proceeds of sale. In the absence of election by him I s nothing to change the character of personalty which the proper had acquired upon the execution of the deed. In the case of resulting trust to the settlor, if conversion took place upon t execution of the deed, I think the property would remain convert when it resulted to the settlor if any of the purposes for whi conversion was directed took effect. It would seem that the on case in which the property results to the settlor in its origin state is where the purposes fail *ab initio* : see *Clarke* v. *Frankl* In the case of a deed it matters not whether the trust for co version does not arise until the death of the settlor : see sa case" (*per* Neville, J., in *Re Ffennell's Settlement*, *supra*, p. 100). See also *Davenport* v. *Coltman* (1842), 12 Sim. 588, 61 *Pulteney* v. *Earl of Darlington* (1783), 1 Bro. C. C. 223, 236, 23 *Re Grimthorpe* (*infra*); *O'Grady* v. *Wilmot*, [1916] 2 A. C. 23 245; 85 L. J. Ch. 386.

The same rules apply to an express trust for the settlo *Griffith* v. *Ricketts* (1849), 7 Hare, 299; *Att.-Gen.* v. *Dod* [1894] 2 Q. B. 150; 63 L. J. Q. B. 319. Where, however, t trust for sale was to be executed upon the request in writing the settlor, and no such request had been given as to part of t land, the real estate remaining unsold at the settlor's dea retained its character of real estate : *Re Goswell's Trusts*, [191 2 Ch. 106; 84 L. J. Ch. 719, in which the older authorities we considered.

In *Re Grimthorpe*, [1908] 2 Ch. 675; 77 L. J. Ch. 321, a settlor y deed settled land subject to certain prior life interests upon rust for himself for life and after his death to trustees upon trust or sale and, after payment out of the proceeds of an annuity o his wife for life and the retention of a sum of £10,000 upon ertain trusts, upon trust for the settlor's children. The settlor ad no children. *Held*, that the trust for conversion having failed *n toto* the land resulted back to the settlor as land. This case vas followed in *Re Hopkinson*, [1922] 1 Ch. 65; 91 L. J. Ch. 28, in which case Sargant, J., discussing *Re Grimthorpe* (*supra*) ays: "That no doubt was a case under a deed, but I can see o difference in principle between the position in respect of a eed and the position in respect of a will which has become perative by the death of the testator" (at p. 72).

Where land is settled upon trust for sale (either with or without power to postpone), and to invest the proceeds and pay the ncome to one for life with remainders over, and no direction is iven as to the application of the rents until sale, the tenant for fe is entitled to such rents, though more than 4 per cent. upon he purchase-money: *Hope* v. *D'Hedouville*, [1893] 2 Ch. 361; 2 L. J. Ch. 589; *Re Searle*; *Searle* v. *Barker*, [1900] 2 Ch. 829; 9 L. J. Ch. 712.

Reconversion by election.

As to reconversion by election: see *Re Sturt*, [1922] 1 Ch. 16; 91 L. J. Ch. 289.

As to the existence of resulting trusts in connection with funds ubscribed for the benefit of certain persons, see *Re Trusts of bbott's Fund*, [1900] 2 Ch. 326; 69 L. J. Ch. 539; *Re Andrew's rust*, [1905] 2 Ch. 48; 74 L. J. Ch. 462; and see *Re Sanderson's rust* (1857), 3 K. & J. 497, at p. 503; and as to the Crown being ntitled to a non-charitable fund as *bona vacantia*, see *Braithvaite* v. *Att.-Gen.*, [1909] 1 Ch. 510; 78 L. J. Ch. 314, discussed n 53 Sol. J. 282.

Charity.

An ultimate trust for the settlor on determination of a gift n perpetuity for the purposes of the charity in the event (which appened) of the cesser or determination of the purposes, is void: *Re Peel's Release*, [1921] 2 Ch. 218; 90 L. J. Ch. 369.

"If a donor makes an incomplete gift of real estate and afterwards, though unintentionally, includes it in a conveyance of eal estate to the donee, that conveyance perfects the intended ift, and prevents the donor from reclaiming it on the ground f resulting trust or otherwise": *per* Astbury, J., *Carter* v. *Hungerford*, [1917] 1 Ch. 260, at p. 273.

Resulting trust for

"It must now be admitted as an established principle, to be pplied in deciding upon the effect of mortgages of this description,

grantor on mortgage notwithstanding the form of the proviso for redemption.

whether it be the estate of the wife, or the estate of the husband the wife joins in the conveyance, either because the estate belongs her, or because she has a charge by way of jointure or dower, of the estate, and there is a mere reservation in the proviso redemption of the mortgage, which would carry the estate fr the person who was the owner at the time of executing mortgage, or where the words admit of any ambiguity; that th is a resulting trust for the benefit of the wife, or for the ben of the husband, according to the circumstances of the case": Lord Redesdale, *Jackson* v. *Innes* (1819), 1 Bli. 104, at p. 1 see also *Jones* v. *Davies* (1878), 8 Ch. D. 205; 47 L. J. Ch. 6 *Heather* v. *O'Neill* (1858), 2 De G. & J. 399, at p. 416; L. J. Ch. 513; *Plomley* v. *Felton* (1889), 14 A. C. 61, at p. 58 L. J. P. C. 50.

New Law.

1. In the case of deeds, in so far as the equitable doctrine conversion as instanced in the last preceding rule is concern after 1925 it would appear to be of little practical effect regards devolution of property, descent to the heir having b abolished.

2. Section 60, sub-section 3 of the Law of Property Act, 19 provides that in a voluntary conveyance a resulting trust for grantor in a conveyance shall not be implied merely by reason t the property is not expressed to be conveyed for the use or ben of the grantee. This only applies to deeds or conveyan executed after 1925 (sub-section 4).

No estate or trust can arise by implication law, and no estate or trust by way of resulting or trust can arise in favour of a person who was the owner of the property conveyed by the dee Fearne, C. R. 49; except where an estate tail ari by necessary implication from the express words the deed: 2 Prest. Estates, 474-5.

But, in *Re Stanley's Settlement*, [1916] 2 Ch. 50; 85 L. J. 809; Sargant, J., doubting whether an estate arising by implicat from the particular language of a deed would be an estate aris by implication of law at all, found sufficient in the settlement that case to enable him to decide that, under a trust to pay rent and net profits of leaseholds to the settlor's daughters M R "for and during the terms of their natural lives as tenants common and not as joint tenants," and after the decease of survivor of them for their respective children, a life interest in whole property was to be implied in favour of the survivor

and R, or rather that M and R were tenants in common for life th a life interest in remainder to the survivor. The learned idge followed the rule of construction laid down "on the other, d, as I think, better view of the principle on which *Armstrong* v. *dridge* (1791), Bro. C. C. 215; *Pearce* v. *Edmeades* (1838), 3 . & C. Ex. 246, and *Re Richerson*, [1893] 3 Ch. 146; 62 L. J. Ch. 9, were decided, namely, that a life interest was to be implied in vour of the survivor of the tenants in common." The three cases med were cases on wills.

Resulting use in favour of grantor only.

Fearne cites *Davies* v. *Speed* (1692), 2 Salk. 675; 4 Mod. 153; Mod. 38; Carth. 262; Show. P. C. 104; Skin. 351; Holt, 730, ere a husband and wife, having joined in a fine of the wife's nds to the use of the heirs of the body of the husband begotten the wife, and for want of such issue, to the use of the right heirs the husband, Holt, C.J., said, "There can be no estate for life to e husband by implication, but the estate is the wife's, to which he a stranger": *Sir Thomas Tipping's Case* (1711), cited 1 P. Wms. 9 (reported *sub nom. Tipping* v. *Pigott*, Gilb. 34; 1 Eq. Ca. Ab. 5, pl. 2); and some cases of devises.

The rule applies to equitable interests in personalty: *Pringle* v. *ingle* (*supra*), p. 413. Cf. *Winn* v. *Fenwick* (1849), 11 Beav. 8; 18 L. J. Ch. 337; 83 R. R. 216.

In some of the cases relating to resulting uses and resulting usts of personalty, the resulting uses and trusts are spoken of as plied uses and trusts, but it is obvious that such expressions e only loose and inaccurate definitions of resulting uses and usts.

Funds deemed settled by wife.

When a father covenants in his daughter's marriage settlement pay a sum as her portion, it is considered to be settled by *her*, so at any interest undisposed of results to her: *Ward* v. *Dyas* (1835), . & Goo. tem. Sug. 177; 46 R. R. 188; *Dennehy* v. *Delany* (1876), . R. 10 Eq. 377; unless a contrary intention appears: *Re Nash* 882), 51 L. J. Ch. 511; 30 W. R. 406; 46 L. T. 97; *Doyle* v. *ean*, [1905] 1 Ir. R. Ch. 252.

But while *Ward* v. *Dyas* and the cases which have followed it e to be treated as of unimpeachable authority, yet a contrary ention as shown by an express provision in the instrument itself y render the rule of construction laid down in the above cases pplicable: *Re Donnelly's Estates*, [1913] 1 Ir. R. Ch. 177; *Re nnell's Settlement*, [1915] 1 Ch. 867; 84 L. J. Ch. 601.

By a marriage settlement the wife's father declared trusts of sonalty for her *during coverture*, but no trusts were declared in event of her surviving her husband during the residue of her time. *Held*, that she took a life interest in the fund: *Allin* v. *wshay* (1851), 9 Hare, 382; 21 L. J. Ch. 873; 89 R. R. 494.

Cross limitations are never implied.

Cross-remainders cannot be implied in a de
an express declaration of intention is ineffec
without apt words of limitation.

New Law. Cross-remainders can only exist as equitable interests, bu
would appear to be necessary, in order to create a cross-remai
in an entailed interest, to use such words as would, prior to 1
in a deed (not being an executory instrument) have validly cre
the same.

"In the case of a deed, cross-remainders cannot be impl
That rule, which was established in *Cole* v. *Levingston* ((1672
Vent. 224; 2 Keb. 700, 856; 3 Keb. 2, where the limitations
stated; 3 Keb. 35, 83), has never been departed from since,
we should be removing the landmarks of real property if we
to bring that rule into question": *per* Lord Kenyon, C.J.,
v. *Dorvell* (1794), 5 T. R. 518, at p. 521; 2 R. R. 662.

See also note to *Cook* v. *Gerrard* (1668), 1 Wms. Saund.,
p. 186 a (ed. 1871, vol. 1, pp. 179 *et seq.*).

"Of the general rule" [that cross-remainders cannot be imp
in a deed] "there is no doubt. . . . The rule, when corre
understood, is in truth only a branch of the general rule, that
estate of inheritance can be created by deed without apt w
indicating the estate to be taken; that is, 'heirs' to create
estate in fee, 'heirs of the body' to create an estate tail. W
lands are conveyed by lease and release, or other assurance, to
use of A and B, as tenants in common, and the heirs of t
respective bodies, A and B have estates tail, each in his
undivided moiety; but it is clear that neither of them has
estate tail whatever in the other's moiety. Let us suppose,
order to put the case as strongly as possible in favour of cr
remainders, that the deed conveying the land should contai
clause expressly stating the intent of the parties to be, that,
case A or B should die without heirs of his body, his mo
should go over to the other, by way of cross-remainder in
Then, supposing these to be the very words used, there could be
doubt as to what the parties intended; but it is certain that, in
event of A or B dying without issue, the intention could not
carried into effect for want of the words 'heirs of the body'
nected with the gift over by way of cross-remainder; and as
cannot be done by any words except the words 'heirs of the bo
however clearly the language may show the intention of the part
so *a fortiori* the object cannot be effected by any inference
intention, however clearly it may arise from the context":
Pollock, C.B., *Doe* v. *Birkhead* (1849), 4 Exch. 110, at p. 1
18 L. J. Ex., at p. 445; 80 R. R. 479. It will be remembered t

deeds executed since 1881 the words " in tail " are sufficient to eate an estate tail : Conveyancing Act, 1881, s. 51 (now incor-rated in section 60 of the Law of Property Act, 1925).

Examples.

Limitation to the use of A and B and of the heirs males of the odies of the said A and B lawfully to be begotten, and for default such issue male of the body of either of them, then to the use of ther of them having issue male of his body lawfully begotten, d for default of such issue male of both the bodies of the said and B or either of them lawfully to be begotten, over. *Held*, at there were no cross-remainders : *Nevill* v. *Nevill* (1617), 1 rownl. & G. 152 ; 1 Roll. Abr. 837 (R.), pl. 2.

Limitation to the use of all and every the daughter and ughters of the body of C on the body of M to be begotten, share d share alike, equally to be divided between them, and of the irs of the body and bodies of all and every such daughter and ughters lawfully issuing, and for default of such issue, over. *eld*, that there were no cross-remainders : *Doe* v. *Worsley* (1801), East, 416 ; 6 R. R. 303.

Limitation " to the use of all and every the child and children the said intended marriage, both sons and daughters equally rt and share alike, if more than one as tenants in common and t as joint tenants, and of the heirs of the body and bodies of all d every such child and children lawfully issuing ; and in case ere shall be more children than one of the said intended marriage, d any such child or children shall happen to die under the age twenty-one years without issue of his or their body or bodies wfully issuing, then and so often, and as to the part and share, rts and shares, of all and every such child and children so dying, the use of the survivors of such children equally part and share ike, if more than one, as tenants in common and not as joint nants, and to the heirs of the body and bodies of all and every ch child and children lawfully issuing, until every such child and ildren shall be dead without lawful issue of their each and every their bodies lawfully issuing ; and in case there shall be but one ild only of the said intended marriage, or one only surviving ild thereof, then to the use of such only or only surviving child the said intended marriage, be the same a son or a daughter, and the heirs of the body of such only or only surviving child ; and r default of such issue, or in case there should be issue of the id intended marriage who should all die without issue of his or eir body or bodies lawfully issuing, under the said age of one-and-enty years, then " over. There were two children, both of whom tained twenty-one. *Held*, that there were no cross-remainders in is event : *Levin* v. *Weatherall* (1819), 1 Bro. & Bing. 401 ; 21

R. R. 669; 4 J. B. Moore, 116; to the same effect is *Meyric Whishaw* (1819), 2 B. & Ald. 810; 21 R. R. 501.

Limitation of leaseholds for lives " to the use of all and e the child and children of A lawfully begotten or to be bego and if more than one, equally to be divided amongst them, s and share alike, as tenants in common and not as joint tena and of the several and respective heirs of the body and bodie all and every such child and children lawfully issuing; an there shall be but one such child, then to the use of such child and the heirs of his or her body lawfully issuing; an default of such issue to the use of the heirs of A. *Held*, that or death of a child without issue and without having made disposition, his share went to the heir of A: *Bainton* v. *Bai* (1865), 34 Beav. 563; 145 R. R. 672.

Cross-remainders of accrued shares.

But if cross-remainders are well created as to the original sh the word " share " will be held to extend to any accrued sh Where the limitation was " to the use of all and every the child children of the body of A on the body of B lawfully begotten c be begotten, equally to be divided between or among them, if r than one, share and share alike as tenants in common and no joint tenants, and to the use of the several and respective hei the body and bodies of all and every such child and children fully issuing; and if there should be a failure of issue of the b or bodies of any such child or children, then as to the part or sh or parts or shares, of such child or children, whose issue shoul fail, to the use of the remaining and other children of the bod A on the body of B lawfully begotten or to be begotten, equall be divided between or amongst them if more than one, share share alike, and they to take as tenants in common, and no joint tenants, and to the use of the several and respective hei the body and bodies of such remaining and other children law issuing; and in case there should be a failure of issue of the bo of all such children but one, or if there should be but one child, then to the use of such only remaining or only child, the heirs of his or her body lawfully issuing"; and for defau such issue, over. It was held that, though cross-remainders well created as to the original shares, they were not created a the accruing shares: *Edwards* v. *Alliston* (1827), 4 Russ. 7 L. J. (o.s.) Ch. 30; 28 R. R. 9; but this case is overruled by *D Birkhead*, where the limitation was to the use of all and every children of a marriage, " to be equally divided between them s and share alike, to take as tenants in common and not as tenants, and of the several and respective heirs of the bodies c and every such children lawfully issuing; and in case one or r of such children should happen to die without issue of his,

their body or bodies, then, as to the share or shares of him, r, or them so dying without issue, to the use of the survivors others of them, share and share alike, to take as tenants in mmon and not as joint tenants, and of the several and respective irs of their bodies lawfully issuing; and in case all such children ould happen to die without issue, or if there should be but one ch child, then to the use of such surviving or only child, and the heirs of his or her body lawfully issuing," and for default such issue, over. The question was, to what interests the ords of limitation applied; in other words, what was meant by e words "share or shares"; whether they applied to the accruing well as to the original shares. It was decided that "the word share,' according to its natural and obvious meaning, includes, at all events, if the context requires it, may include, every terest which the child takes under the limitations of the settlement": *Doe* v. *Birkhead* (1849), 4 Exch. 110.

A similar meaning was given to the word "share" in *Re Hutchinson's Settlement* (1852), 5 De G. & Sm. 681; 17 Jur. 59.

Executory instruments.

In executory instruments cross-remainders may be implied: *West* v. *Errissey* (1727), 2 P. Wms. 349; 1 Bro. P. C. 225; *Phillips* v. *James* (1865), 2 Dr. & Sm. 404, affirmed (*diss.* Knight-Bruce, L.J.), 3 De G. J. & S. 72; 143 R. R. 200.

"Survivors" read "others."

Where there is a limitation to several, or to a class, as tenants in common in tail (or tail male) with remainder, as to the share of each, to the "survivors," in tail (or tail male), and there is a gift over on failure of issue (or issue male) of all the donees in tail, the word "survivors" will be construed "others."

Limitation to the use of the child or children of A as tenants in ommon if more than one and the heirs of their several bodies ssuing; "and in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part r parts of him, her, or them so dying without issue should be and emain to the use of the surviving child or children of the said A, nd the heirs of his, her, or their respective bodies issuing, and so *oties quoties* as any of the said children should die without issue, ill there should be only one child left; and in case all the said hildren should die without issue, or if the said A should have no ssue of her body," over. There were three children, John, Mary, nd Robert. Mary married and died, leaving issue W. and two ther children. John died without issue, and without having

disposed of his share. *Held*, that John's share vested in W.
Robert, as tenants in common.

"Here the single question arises on the meaning of the w
'surviving,' which, indeed, is the only word that distresses
case. But, taking the whole context together, I do not think t
that word renders the case doubtful. The fair construction of t
word, standing in this context, is that on the death of one c
without issue, that portion shall go to the surviving line of he
and not merely to one child surviving; it must go to the surviv
children in their own persons if living, or, if dead, to their iss
And in putting this construction, I do not think we proceed
conjecture merely; for the conclusion of this sentence is, 'And
case all the said children should die without issue,' then
remainder is limited to R. Abell in fee. We cannot give effec
the word 'all' without determining that there must be cr
remainders, not only as long as the individual children, but
long as the several lines of those children exist": *per* L
Kenyon, C.J., *Doe* v. *Wainwright* (1793), 5 T. R. 427, at p. 4
2 R. R. 634; *Cole* v. *Sewell* (1848), 2 H. L. C. 186; 5 Ir. Law R
190; 6 Ir. Eq. Rep. 66; 2 Con. & L. 344; 4 Dr. & War. 1; 81 R.
109, followed in *Re Friend's Settlement*, [1906] 1 Ch. 47; 75 L
Ch. 14.

Personalty.

The same rule has been applied to trusts of personalty in sh
for several for life, with remainders to their respective chil
absolutely with a gift over of the share of any of them who
without children to the survivors and their children, with
ultimate gift over of the whole in default of any of them ha
children: *Re Palmer's Settlement* (1875), 19 Eq. 321; 44 L
Ch. 247.

"Shall die" extended to "are now dead."

A gift over of the shares of persons dying in the lifetime
tenant for life was extended to the shares of persons dead at
date of the deed in the case of *Barnes* v. *Jennings* (1866), L. R
Eq. 448; 35 L. J. Ch. 675, where the trusts of a voluntary settlem
were for the settlor for life, and after his death for A, B, C, and
in equal shares, with a proviso that if any of them "should di
the lifetime" of the settlor their shares should go to their is
or if no issue should accrue to the other shares, and it was
that the gift over applied to the shares of A and B, who were
at the date of the deed.

CHAPTER XXI.

REMOTENESS AND PERPETUITY.

reehold Estates in futuro, other than Remainders, are Void at Common Law: After Life Estate to Unborn Parent No Estate to his Children [Rule now abolished]: Rule against Perpetuities: How applied to Execution of Powers: Indefinite Powers of Sale: Whether Rule applicable to Legal Contingent Remainders: Limitations to be construed as Remainders if possible: Personal Covenants: Statutory Grants or Trusts: Exceptions to Rule: Grants to Fluctuating Bodies Void: Except by Crown: Charitable Trusts.

ALTHOUGH the rules relating to remoteness and perpetuity are trictly speaking not rules of interpretation, but rules of law, it eems advisable to state them in this work. Most of the rules elate also to wills, on which nearly all the cases have arisen, and o attempt has been made to collect the cases, but many of those rising on deeds are mentioned.

The rules are of two classes; one relating to limitations at ommon law, the other to limitations under the Statute of Uses.

The main common law rule is :—

Limitations creating future estates of freehold other than remainders are void.

> Any limitation, by which an estate of freehold in corporeal hereditaments, purports to be so granted as to commence, either upon the expiration of a fixed interval of time after the execution of the assurance, or upon the happening of some future contingency, other than the determination of a precedent estate of freehold, is void in its inception.

The authorities are : *Bullock* v. *Burdett* (1567), Dyer 281 a; Moore, 81; *Boraston's Case* (1587), 3 Rep. 19, at 21 a; *Hogg* v. Cross (1591), Cro. Eliz. 254; *Buckler's Case* (1597), 2 Rep. 55; Barwick's Case (1597), 5 Rep. 93 at 94 b; *Roe* v. *Tranmarr* (1758), Willes, 682; *sub nom. Roe* v. *Tranmer*, 2 Wils. 75; *Savill Bros., Ltd.* v. *Bethell*, [1902] 2 Ch. 523, at 540; 10 Vin. Abr. 206,

Estate, B. pl. 10; *ibid.*, 208, pl. 26; Plowden, 156, *arguen*
2 Bl. Com. 165; 1 Prest. Est. 217; Challis, R. P. (3rd ed.), 104

No freehold *in futuro.*

This rule is often (inaccurately) expressed as follows: "
freehold *in futuro* can be created."

Contra under Statute of Uses.

This rule does not apply to limitations under the Statute
Uses. Thus the ordinary shifting uses in a settlement, which s
the property to a younger son and his issue on an elder son or
issue becoming entitled to other property, are good under the Stat
of Uses, though they are altogether invalid at common law: *Bu*
hurst Peerage Case (1876), 2 App. Cas. 1; *per* Ld. Cairns, C.,
p. 27; *per* Ld. Chelmsford, at p. 33; and *per* Ld. O'Hag
at p. 38.

Any limitation similar to that mentioned above, of an estate
freehold derived out of a remainder or reversion expectant u
a particular estate of freehold, is likewise void in its incepti
Buckler's Case (1597), 2 Rep. 55; *Barwick's Case* (1597), 5 Rep.
at 94 b; *Swift* v. *Eyres* (1639), Cro. Car. 546; 10 Vin. Abr. 2
Estate, B. pl. 9; 1 Prest. Est. 219; Challis, R. P. (3rd ed.), 111

Incorporeal hereditaments *in esse.*

Any similar limitation of an estate of freehold in any incorpo
hereditament already *in esse* at the time of the limitation is voi
its inception: 1 Prest. Est. 217; Challis, R. P. (3rd ed.), 111.

Incorporeal hereditaments created *de novo.*

Limitations of incorporeal hereditaments *de novo* are not wit
the rule: *Case of Sutton's Hospital* (1613), 10 Rep. 23, at 27
Plowd. 156, *arguendo*; Challis, R. P. (3rd ed.), p. 112.

No estates at intervals.

No estate of freehold, whether in corporeal hereditaments
incorporeal hereditaments already *in esse*, can be limited, or cau
to exist at intervals only, and not continuously: *Corbet's C*
(1600), 1 Rep. 83, at 87 a, b; *The Prince's Case* (1605), 8 Rep.
at 17 a; Challis, R. P. (3rd ed.), 112.

Leasehold interests.

A leasehold interest to commence *in futuro* can be creat
such an interest, until the lessee goes into possession under
lease, is called an *interesse termini*: Co. Litt. 345 a; Com. Dig.
Estate, G. 14; *per* Bayley, J., *Doe* v. *Walker* (1826), 5 B. & C.
at p. 118; 4 L. J. (o.s.) K. B. 93; 29 R. R. 184.

An *interesse termini* does not enlarge the term of the orig
lease and does not entitle the landlord (entitled to an *inter*
termini) to distrain for rent: *Lewis* v. *Baker*, [1905] 1 Ch. 46
L. J. Ch. 39. The *interesse termini* which a reversionary lease f
term to commence more than twenty-one years after the dat
the lease confers upon the lessee is not an executory or conting
but an immediate vested interest in the land itself, and does
come within the mischief of the rule against perpetuities,
Neville, J., in *Mann, Crossman and Paulin, Ltd.* v. *Registra*
Land Registry, [1918] 1 Ch. 202; 87 L. J. Ch. 81; appro
Bewley, J.'s, statement of the rule in relation to leases in rever

Rivington v. *Browne* (1893), 32 L. R. Ir. 347. See on the general octrine of *interesse termini*, Challis R. P. (3rd ed.), pp. 472-3.

The doctrine of *interesse termini* is abolished by section 149, ub-section 1, Law of Property Act, 1925. After 1925 all terms of ears absolute, whether the interest is created before 1926 or after 925, shall be capable of taking effect at law or equity, according the estate interest or powers of the grantor from the commence-ent of the term without actual entry (section 149, sub-section 2). ut nothing in these two sub-sections is to affect prejudicially the ghts of anyone to recover rent or to enforce covenants or con-tions, nor, as to terms or interests created before 1926, is it to erate to vary any statutory or other obligations imposed in respect such terms or interests (section 149, sub-section 4). New Law.

A further common law rule is :—

> No estate in corporeal or incorporeal hereditaments can be limited after an estate for life to an unborn person to his child or children : *Whitby* v. *Mitchell* (1889), 42 Ch. D. 494 ; (1890), 44 Ch. D. 85 ; 59 L. J. Ch. 485, where all the cases are collected and discussed.

Limitation to unborn person for life, remainder to his issue, the remainder is void.

This rule is abolished as regards limitations or trusts created y an instrument coming into operation after 1925. New Law.

This rule applies to limitations under the Statute of Uses; *hitby* v. *Mitchell*, *ubi supra*, but is applicable to real estate only, cluding copyholds : *Re Clarke's Settlement Trust*, [1916] 1 Ch. 7 ; 85 L. J. Ch. 592 ; and to equitable as well as legal estates : *Re larke's Settlement* (*supra*) ; *Re Nash*, [1909] 2 Ch. 450 ; 78 L. J. h. 657 ; [1910] 1 Ch. 1 ; 79 L. J. Ch. 1 ; and has no reference to ersonalty : *Re Bowles*, [1902] 2 Ch. 650 ; 71 L. J. Ch. 822.

The rule relating to executory limitations arising under the atute of Uses (*now repealed*) and to trusts may be stated as llows :—

> An executory limitation or trust must take effect, if it takes effect at all, within a life or any number of lives in being at the date of the assurance and twenty-one years after the dropping of the life or the last of the lives. See Sugden's Gilbert's Uses (3rd ed.), p. 260 note.

Rule against perpetuities.

A person *en ventre sa mère* is a life in being within the meaning this rule, for ascertaining both the lives during which the vesting ay be postponed, and the person in whom the limitation must st. Child *en ventre*.

Twenty-one years.

The twenty-one years is a term in gross, and need have reference to infancy: *Cole* v. *Sewell* (1848), 2 H. L. C. 186, p. 233; 81 R. R. 109.

Gift over of life interest.

In a marriage settlement of personalty a gift over of life inter to persons *in esse* at the date of the settlement is void for petuity if dependent on the failure of limitations that are remote: *Re Hewett's Settlement*, [1915] 1 Ch. 810; 84 L. Ch. 715.

Nothing barrable is too remote.

No limitation, to take effect on the determination or defeasance of an estate tail, can be too remote if it can be barr Co. Litt. 271 b, n. (1), V.; *Cole* v. *Sewell* (*supra*), at pp. 226, 2

But limitations or trusts not barrable by a tenant in tail, *e.g.*, trusts in a term preceding the limitation of the estate t may be too remote: *Lord Southampton* v. *Marquis of Hertf* (1813), 2 Ves. & B. 54; 13 R. R. 18; *Floyer* v. *Bankes* (18 L. R. 8 Eq. 115.

Settlement on husband and wife for lives, remainder to son tail *male*, remainder to daughters in tail, remainder to survivo husband and wife in fee, with power to wife, if the husband survi and all the children of the marriage died *without issue*, to cha the estate with £5,000. There was one child of the marriage, a who died under twenty-one without issue. *Held*, that the po was too remote: *Bristow* v. *Boothby* (1826), 2 S. & Stu. 4 4 L. J. (o.s.) Ch. 88; 25 R. R. 248; affirmed on appeal, as app from *Ellicombe* v. *Gompertz* (1837), 3 My. & Cr. 127, at p. 1 45 R. R. 234.

Option to purchase.

An option to purchase at any time is void: *London S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562; 51 L. J. Ch. 5 *Trevelyan* v. *Trevelyan* (1885), 53 L. T. 853; even if contained lease and in favour of the lessee: *Woodall* v. *Clifton*, [1905] 2 257; 74 L. J. Ch. 555; *Worthing Corporation* v. *Heather*, [19 2 Ch. 532; 75 L. J. Ch. 761, which see also as to damages breach of contract.

In an agreement for a lease it was provided that the prospec tenant should "take the house for three, five, or seven years, have the option of purchasing either the freehold or a lease ninety-seven years." No lease was, in fact, ever executed, and tenant entered into possession.

Held, that as regards the option to purchase the freeh this was void under the rule against perpetuities, being, as it unlimited as to time, but that as regards the option to purch the lease (being, in fact, an option to call for a lease) this was so, and was exercisable so long as the relationship of landlord tenant existed.

Held, further, that, notwithstanding that the terms of the

ase were different from those of the original lease, an option to ll for a lease was outside the rule against perpetuities : *Rider* v. *ord*, [1923] 1 Ch. 541; 92 L. J. Ch. 565.

Such an option does not run with the land so as to be binding on e assignees of the reversion; but an option given to the lessee is as tween him and the lessor unobjectionable : *Bradbury* v. *Grimble Co.*, [1920] 2 Ch. 548; 89 L. J. Ch. 645. See *Re Adams and e Kensington Vestry* (1884), 27 Ch. D. 394; 54 L. J. Ch. 87; d as to the effect of an option to purchase, see *Re Marlay*, [1915] Ch. 264, 275; 84 L. J. Ch. 706; *Re Blake*, [1917] 1 Ch. 18; L. J. Ch. 160.

Personal agreement.

"It is settled beyond argument that an agreement merely rsonal not creating any interest in land, is not within the rule gainst perpetuities" : *per* Farwell, L.J., *South Eastern Ry. Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12 at 33; 79 L. J. Ch. 150.

Condition for reverter.

A common law condition for reverter is within the rule, and is nsequently void if unlimited in time : *Dunn* v. *Flood* (1883), 25 h. D. 629; 53 L. J. Ch. 537; *Re Hollis Hospital Trustees' and ague's Contract*, [1899] 2 Ch. 540; 68 L. J. Ch. 673.

So an exception in favour of a vendor out of a grant of land of a iece of land forty feet wide commencing at a fixed point and rminating at the nearest road *to be made* by the purchaser is void r remoteness, even it if would take effect under the Statute of ses : *Savill Bros., Ltd.* v. *Bethell*, [1902] 2 Ch. 523; 71 L. J. h. 652.

Restraint on anticipation.

It follows from the rule that in a limitation to an unborn woman r life she cannot be restrained from anticipation : *Fry* v. *Capper* 1853), Kay, 163; *Re Teague's Settlement* (1870), L. R. 10 Eq. 564; *Vhitby* v. *Mitchell* (*supra*), p. 425.

Limitations arising under the exercise of powers.

Where the executory limitation arises under the exercise of a ecial power, the time from which the period prescribed by the rule egins to run is the date of the assurance creating the power : *e Brown and Sibly's Contract* (1876), 3 Ch. D. 156; see also *Re amadge*, [1919] 1 Ir. R. Ch. 205; but under the exercise of a eneral power, the time begins to run from the date of the assurance xercising the power : *Rous* v. *Jackson* (1885), 29 Ch. D. 521; 54 . J. Ch. 732; *Re Flower* (1885), 34 W. R. 149; 55 L. J. Ch. 200.

As to the meaning of the words "capable of taking effect" here a testatrix having a special power of appointment appointed the uses or trusts of a prior instrument or such of them as were capable of taking effect"—*Re Finch and Chew's Contract*, [1903] Ch. 486; 72 L. J. Ch. 690 (a will case).

Void *pro tanto*.

And where the exercise of the power transgresses the rule the mitations as a whole are not void, but only such part thereof as

transgresses the rule : *Re Teague's Settlement* (1870), L. R. 10 I 564; *Re Cunynghame's Settlement* (1871), 11 Eq. 324; 40 L. Ch. 247.

That limitations can be released not sufficient.

It was at one time thought that if the persons who would t under the executory limitation were ascertained within the lin of perpetuity so that it could be released, the fact that the limitat did not take effect within such limits was immaterial : *Birmingh Canal Co.* v. *Cartwright* (1879), 11 Ch. D. 421; 48 L. J. Ch. 5 but this is not the law : *London and S. W. Ry.* v. *Gomm* (18 20 Ch. D. 562.

Conveyancing Act, 1882, sect. 10.

An executory limitation, which is not obnoxious to the rule in one particular case defeated by the Conveyancing Act, 1882, s. which enacts that " where there is a person entitled to land for estate in fee, or for a term of years absolute or determinable life, or for term of life, with an executory limitation over on defa or failure of all or any of his issue, whether within or at specified period or time or not, that executory limitation shall be become void and incapable of taking effect, if and as soon as th is living any issue who has attained the age of twenty-one ye of the class on default or failure whereof the limitation over wa take effect. (2) This section applies only where the execut limitation is contained in an instrument coming into operation a the commencement of " the Act, *i.e.*, after December 31, 1882.

An executory limitation over such as that mentioned in section could not be barred by a recovery : *Pells* v. *Brown* (16 Cro. Jac. 590.

New Law.

Section 10 of the Conveyancing Act, 1882, is replaced section 134 of the Law of Property Act, 1925. In the case instruments operating before 1926 the original section still appl but as to instruments operating after 1925 the new section appl the section begins : " Where there is a person entitled to (a) equitable interest in land for an estate in fee simple or for any interest not being an entailed interest, or (b) any interest in o property (*e.g.*, *personalty*) not being an entailed interest." Ot wise the old section is substantially unaltered.

Validity of indefinite powers of sale.

The validity of the indefinite powers of sale and exchange tained in strict settlements depends on the doctrine that, so fa they are exercisable at a time later than the terms of the rule wo permit, they are subsequent to the estates tail and are there barrable : *Waring* v. *Coventry* (1833), 1 My. & K. 249; 36 R. 318; *Wallis* v. *Freestone* (1839), 10 Sim. 225; and also on the that the powers are valid in their inception and consequently be exercised before the remainder in fee simple becomes veste possession : *Boyce* v. *Hanning* (1832), 2 C. & J. 334; 1 L. J.

23; 37 R. R. 728; *Lantsbery* v. *Collier* (1856), 2 K. & J. 709; 25 . J. Ch. 672; 110 R. R. 430.

A trust for sale which does not arise until after the death of an nascertained husband or wife is void for perpetuity : *Re Garnham*, 1916] 2 Ch. 413; 85 L. J. Ch. 646 (a case on a will).

Whether rule applies to legal remainders.

There has been much difference of opinion as to whether the rule gainst perpetuities applies to the vesting of legal remainders. hus it is said (*per* Sugden, L.C. of Ireland, *Cole* v. *Sewell* (1843), Dr. & W. 1, at p. 28; and *per* Lord Brougham, *S. C.* in D. P. 1848), 2 H. L. C. 186, at pp. 230, 231; 81 R. R. 109) that the rule oes not apply; while there are *dicta contra* in *Cattlin* v. *Brown* 1853), 11 Hare, 372, *per* Sir W. Page Wood, V.-C., at p. 374; 90 . R. 733; and in *Re Frost* (1889), 43 Ch. D. 246, *per* Kay, J., at . 252; 59 L. J. Ch. 118; and the decision of Farwell, J., in *Re shforth*, [1905] 1 Ch. 535; 74 L. J. Ch. 361 (a case on a will) is lso *contra*.

New Law.

Contingent remainders can only exist as equitable interests nder the new legislation and, after 1925, there exists only one ircumstance which renders them liable to failure, and that is he rule against perpetuities.

The Contingent Remainders Act, 1877, has not been re-enacted. t was repealed by the Law of Property (Amendment) Act, 1924, 0th Schedule. The under-mentioned proposition must therefore e read subject to the new conditions.

Law deducible from cases.

The result deducible from the cases seems to be that the rule gainst perpetuities partly does, and partly does not, apply to the esting of legal contingent remainders. The rule deducible from he cases appears to be—a legal contingent remainder (other than legal contingent remainder to take effect after an estate tail, which, eing barrable, cannot be void) must as regards time vest within a ife in being and twenty-one years, and is void in its creation unless t must so vest; but, if it must so vest, it can be limited to a person, r class of persons, who could not be a grantee or grantees, if the state limited by way of remainder had been limited by way of xecutory limitation, as being possibly, to be ascertained on too emote an event, and will vest in such person if he fulfil the con- ition, or such member or members, if any, of the class as fulfil the ondition, at the moment the remainder vests in possession.

Examples.

Remainder after estate tail good.

First, with regard to legal contingent remainders to take effect fter an estate tail. Settlement to use of settlor for life, remainder o use of his daughters for lives, remainder as to the share of each aughter to the use of her sons successively in tail male : with ross-remainders as to each share : remainder in case all daughters ied without issue male as to each daughter's share to the use of er daughters as tenants in common in tail : and in case any

daughter should die *without issue* the share of such daughter to to the use of the daughters of the survivors as tenants in comm in tail general. *Held*, that the limitation, in case of the failure issue generally of any of the daughters, to the daughters of survivors was a good contingent remainder and not void remoteness : *Cole* v. *Sewell* (1848), 2 H. L. C. 186; 81 R. R. 1

Remainder void because not certain to vest within time limited by rule.

Secondly, with regard to such remainders not taking effect a estates tail. If land be limited to A for life, remainder to his s for life, remainder on the death of the last but one of such sons the surviving son of A in fee, the limitation in fee is void : *Ashforth* (*supra*), p. 429 (a case on a will), because it is poss that such limitation *may* not vest within twenty-one years a A's death. It is not rendered valid if in fact all A's sons one die within twenty-one years after A's death, for to make limitation valid the limitation must be such that it *must* vest wit twenty-one years after A's death.

Remainder good because certain to vest if at all within time limited by rule.

On the other hand, if land be limited to A for life with remain in fee to such of A's sons as attain twenty-five the limitation fee is good as a contingent remainder, but bad as an execut interest : *Symes* v. *Symes*, [1896] 1 Ch. 272; 65 L. J. Ch. 2 The contingent remainder will vest in such, if any, of A's sons a A's death have attained twenty-five; if there are none it will course fail altogether. Such a limitation is good as a le contingent remainder because it *must* vest, if it vests at all, wit the period allowed by the rule against perpetuities, viz., in the c put, at the moment of A's death. But as an executory interes would be invalid in its creation, because it is limited to A's s who attain twenty-five, and A might have sons who did not att that age within twenty-one years after his death, and as rega executory interests possible, and not actual, events are to considered : moreover, if such a limitation could be created by of executory interest, it would not fail, as a contingent remain would, if no son had attained twenty-five at A's death, beca executory interests do not, while contingent remainders do, fai not limited to vest immediately on the expiration of the p estates of freehold.

Law so deduced not accepted by all conveyancers.

It is foreign to the scope of this work to discuss the cases, al which arise on wills, but it is believed that the law to be dedu from the cases is as above stated. The law as so stated has b impugned by modern writers, many of whom, relying on the ol text writers and *dicta*, still contend that the rule against perpetui has no reference to the creation of legal contingent remaind For will cases, see (*inter alia*) *Re Garnham* (*supra*), p. 429; *Atkinson*, [1916] 1 Ch. 91; 85 L. J. Ch. 159.

By a deed exercising a special power in a marriage settlem

nd was limited after the deaths of the appointors, the tenants for ie under the settlement, to the use of A, B, and C, the children the only son of their marriage, and all other his child and children ho should be living at the death of the survivor of the appointors, id to the heirs and assigns of such of them as should attain twenty-ve, equally as tenants in common; there were seven children of ie son, all of whom were living at the death of the survivor of the ppointors, but only the three named in the appointment had then tained twenty-five. It was held by North, J., that the limitations ere legal contingent remainders, that each child took one-seventh r life, and that subject to such life estates the three who had tained twenty-five took the remainder in fee equally between them tenants in common: *Symes* v. *Symes*, [1896] 1 Ch. 272; 65 . J. Ch. 265.

Limitations to be construed as remainders if possible.

It must be remembered that every limitation which can take fect as a remainder must be construed as a remainder and not as executory limitation: Fearne, C. R. (10th ed.), vol. i, pp. 386, 395.

Contingent remainders no longer fail by cesser of particular estate.

And although contingent remainders were liable to be defeated y the determination, before the time limited by the settlor, of the articular estate, this is no longer the case, for it will be remembered at, by 40 & 41 Vict. c. 33, s. 1 (*a*): "Every contingent remainder eated by any instrument executed after the passing of the Act August 2, 1877] . . . in tenements or hereditaments of any nure which would have been valid as a springing or shifting use . . or other limitation, had it not had a sufficient estate to support as a contingent remainder, shall in the event of the particular tate determining before the contingent remainder vests, be capable taking effect in all respects as if the contingent remainder had iginally been created as a springing or shifting use . . . or other xecutory limitation."

As to a legal contingent remainder being regarded as an xecutory limitation by the implied insertion of trustees in order to revent the acceleration of the remainderman's estate, the tenant r life in possession having disclaimed, see *Re Scott*, [1911] Ch. 374; 80 L. J. Ch. 750; but the decision in this case has been oubted as being based on a wrong interpretation of the Contingent emainders Act, 1877. See *Re Brooke*, [1923] 2 Ch. 265; 92 . J. Ch. 504. These are cases on wills.

In view of the new law the doubts expressed as to whether the ontingent Remainders Act applied in the case of a gift without a e "to A for life, remainder to his first son who shall reach enty-one," are of small importance. See Topham's Real Pro-rty (5th ed.), p. 397, n.

(*a*) Repealed by the Law of Property (Amendment) Act, 1924, and not enacted by subsequent legislation.

Personal covenants.

The rule against perpetuities does not apply to personal c nants, as to get stone at a quarry : *Keppell* v. *Bailey* (1834), 2 & K. 517; 39 R. R. 264; *Borland's Trustee* v. *Steel Bros.*, L [1901] 1 Ch. 279; 70 L. J. Ch. 51; see also *Worthing Corporatio Heather*, [1906] 2 Ch. 532; 75 L. J. Ch. 761; *S. E. Ry.* v. *Associ Portland Cement Manufacturers*, [1910] 1 Ch. 12; 79 L. J. Ch.

Statutory grants and trusts.

The rule does not apply to statutory grants or trusts.

"The trust being created by statute cannot be held invalid the ground of perpetuity": *per* Lindley, L.J., *Re Christch Inclosure Act* (1888), 38 Ch. D. 520, at p. 530; and a perpe option to purchase contained in an agreement scheduled to an of Parliament, and thereby declared to be valid and binding on parties thereto, was consequently held good in *Manchester S Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352; L. J. Ch. 850; [1901] 2 Ch. 37; 70 Sol. J. 468.

Exceptions to rule.

There are exceptions to the application of the rule aga perpetuities, for it does not apply to—

Conditions in defeasance of leases.

1. Conditions in defeasance of terms of years. There seem be no direct authority as to this, but they are of everyday oc rence and no one has ever suggested they are not valid. *Con* conditions in defeasance of a fee : *Re Hollis Hospital Trustees' Hague's Contract*, [1899] 2 Ch. 540; 68 L. J. Ch. 673.

Covenants to renew leases.

2. Covenants for renewal contained in leases : *London and S. Ry.* v. *Gomm* (1882), 20 Ch. D. 562, at p. 579; 51 L. J. 530; *Muller* v. *Trafford*, [1901] 1 Ch. 54; 70 L. J. Ch. 72. *Con* options to purchase contained in leases : *Woodall* v. *Clifton*, [19 2 Ch. 257; 74 L. J. Ch. 555; and see *Bradbury* v. *Grimble &* *supra*, p. 427.

Negative covenants.

3. Negative covenants which run with the land in equity tho not at law : *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 78 R. R. 2 *London and S. W. Ry.* v. *Gomm* (1882), 20 Ch. D. 562, p. 583; *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265; 59 L. Ch. 188.

New Law.

Law of Property Act, 1925, section 162.

162.—(1) For removing doubts, it is hereby declared that rule of law relating to perpetuities does not apply and shall deemed never to have applied—

(a) To any power to distrain on or to take possession of lan the income thereof given by way of indemnity again rent, whether charged upon or payable in respect of part of that land or not; or

(b) To any rentcharge created only as an indemnity aga another rentcharge, although the indemnity rentcha may only arise or become payable on breach of a condi or stipulation; or

(c) To any power, whether exercisable on breach of a condi

New Law.

or stipulation or not, to retain or withhold payment of any instalment of a rentcharge as an indemnity against another rentcharge; or

(d) To any grant, exception, or reservation of any right of entry on, or user of, the surface of land or of any easements, rights, or privileges over or under land for the purpose of—

(i) winning, working, inspecting, measuring, converting, manufacturing, carrying away, and disposing of mines and minerals;

(ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof;

(iii) executing repairs, alterations, or additions to any adjoining land, or the buildings and erections thereon;

(iv) constructing, laying down, altering, repairing, renewing, cleansing, and maintaining sewers, water-courses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works.

(2) This section applies to instruments coming into operation fore or after the commencement of this Act.

Grant to, or trust for, fluctuating body void.

A grant to, or trust for, a fluctuating body is void as tending to a perpetuity.

"The parishioners or inhabitants or *probi homines* of Dale are t capable to purchase lands": Co. Litt. 3 a.

"The claim by the inhabitants and by the overseers of the town-ip is a claim by persons who are incapable of taking a grant, not ing a corporation": *per* Erle, C.J., *Constable* v. *Nicholson* 863), 14 C. B. (N.S.) 230, at p. 240; 32 L. J. C. P. 240; 135 R. 672.

Such right "cannot exist by grant": *per* Jessel, M.R., *ilton* v. *Corporation of London* (1878), 7 Ch. D. 735, at p. 740.

"I have not been able to find any case in which it has been said at such a grant would be good unless where being from the Crown d out of Crown property it might be implied that the Crown ated the grantees a corporation for this special purpose": *per* rd Blackburn, *Goodman* v. *Mayor of Saltash* (1882), 7 App. Cas. 3, at p. 656. See also *Westropp* v. *Congested Districts Board*, 918] 1 Ir. R. Ch., at p. 293.

Contra, by Crown,

But such a grant by the Crown out of Crown property would be pported as being an incorporation of the fluctuating body *quoad* e grant: *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103; 36 J. Ch. 64.

or in favour of charity.

And such a trust in favour of charitable purposes is g
"No charitable trust can be void on the ground of perpetuit
per Selborne, L.C., *Goodman* v. *Mayor of Saltash* (1882
App. Cas. 633, at p. 642; *Re Christchurch Inclosure Act* (18
38 Ch. D. 520; 57 L. J. Ch. 564.

A grant of land for the pasture during three months of
year of cows of as many of the inhabitants of a village as
able to buy three cows, and during seven months of the rest of
year to be in common for all the inhabitants, was upheld
charitable: *Wright* v. *Hobert* (1723), 9 Mod. 64.

The Accumulations Act, 1800, as applied to deeds.

A trust for accumulation created by deed receives the same
struction as it receives in the case of a similar trust created by
see *Re Lady Rosslyn's Trust* (1848), 16 Sim. 391; 18 L. J. Ch.
and the four different periods beyond which the direction
accumulation is unlawful under the first section of the 1800 Act
alternative and not cumulative: see *Jagger* v. *Jagger* (1882)
Ch. D. 729; 53 L. J. Ch. 201. See also *Re Errington*, 76 L. T.

New Law.

The Accumulations Acts, 1800 and 1892, are replaced
sections 164, 165 and 166 of the Law of Property Act, 1925,
certain alterations which are not relevant here; and see
Schedule to that Act.

CHAPTER XXII.

JOINT TENANCY—TENANCY IN COMMON.

oint Tenancy, how created: Limitations to Corporations, together with Ordinary Persons: To Husband and Wife: Rents reserved to Coparceners: Executory Instruments: Joint Tenants, Tenants in Common in Equity: Tenancy in Common, how created: Express Gift to Survivor.

In limitations to, or trusts for, several it is necessary to determine whether they take as joint tenants or as tenants in common.

What limitations are joint.

A limitation, either at common law [or by way of use], of estates of the same nature to, or a trust for, several, either *nominatim* or as a class, without more, makes them joint tenants.

The estates must be of the same nature.

The estates must be of the same nature; one cannot be freehold and the other chattel: Co. Litt. 188 a; 2 Bl. Comm. 181; one cannot be in possession and the other in reversion: Litt. s. 302; Co. Litt. 188 a.

New Law.

So far as the new law is concerned, this rule must be read ıbject to the new rules regarding words of limitation as shown in hapter XVI.

Distinction between grants at common law and under Statute of Uses.

If the conveyance is at common law the estates must begin at ıe same time, but this is not necessary where the estates are nited by way of use under the Statute of Uses: Co. Litt. 188 a; *ales* v. *Risley* (1674), Pollexf. 369, at p. 373.

"A and B and their heirs."

A limitation to two and their heirs vests the fee simple in them joint tenants: Fearne, C. R. 35.

"A and B and the heirs of their bodies."

A limitation to two men, or to two women, and the heirs of their odies: Litt. ss. 283, 284; Co. Litt. 182 a, 183 a; or to a man and oman who cannot marry and the heirs of their bodies; or to two en and one woman (or to one man and two women) and the heirs their bodies: Co. Litt. 25 b, 184 a; makes them joint tenants r life, with several inheritances: Litt. s. 283; Shep. Touch. 111,

112; see this discussed Fearne, C. R. 36. But a limitation t husband and wife, or to a man and woman who can marry, and the heirs of their two bodies, gives them an estate in special tai the entirety: Co. Litt. 25 b; see *supra*, Chapter XVI on Lim tions to Heirs.

It is said by Fearne, C. R. 36, that a limitation to two suc sively for life, remainder to the heirs of their bodies, gives ther joint remainder in tail.

A limitation to two and the heirs, or heirs of the body, of c gives them joint estates for life, and the inheritance to one: L s. 285; Co. Litt. 184 a (see the discussion in the note (2) p. 184 b).

A and B and survivor and heirs of survivor.

As to the construction of a limitation to A and B and the s vivor of them, and the heirs of the survivor, see Mr. Butler's n to Co. Litt. 191 a; Fearne, C. R. 357.

Joint life estate and joint limitation to heirs.

A limitation to A, B, and C, for their lives, or in tail, follo by a limitation to their heirs, gives them a joint estate in fee simp Co. Litt. 183 b, 184 a; Fearne, C. R. 35.

Under a limitation to the use of all the daughters of A and heirs of their bodies the two daughters took joint estates for life several inheritances in tail. And though the remainders vested them at several times, viz., in the eldest daughter as soon as was born, and the younger afterwards, yet this being by way of they are joint tenants notwithstanding: *Hales* v. *Risley* (16 Pollexf. 369, at p. 373.

Limitation to the use of the husband for life, remainder to use of the wife for life, remainder to the use of all the issues fen of their bodies, and the heirs male of the bodies of such iss female. *Held*, that the daughters took as joint tenants for l with several inheritances: *Matthews* v. *Temple* (1698), Comb. 4 *S. C. sub nom. Sussex* v. *Temple*, 1 Ld. Raym. 310.

Limitation by deed to "issue male" in remainder after the de of their father. *Held*, that the sons took as joint tenants for l *Fitzherbert* v. *Heathcote* (1771), cited *Bayley* v. *Morris* (17 4 Ves. 788, at p. 794.

Use in a settlement in remainder after the death of the surv of the husband and wife "to permit all and every such chil . . . to take the rents . . . to them and their heirs for ev *Held*, that the children took as joint tenants: *Stratton* v. (1787), 2 Bro. C. C. 233.

Trust of personalty.

Trust of renewable leaseholds in a marriage settlement for A life, remainder for his children. *Held*, that the children tool joint tenants: *Staples* v. *Maurice* (1774), 4 Br. P. C. 580.

A husband took out a policy of assurance on his own under the Married Women's Property Act, 1870, s. 10, whe

is wife and the children of their marriage were to be entitled to eceive the funds. *Held*, that the wife and all the children living t the death of the husband, whether born before or after the policy as taken out, were entitled as joint tenants : *Re Seyton* (1887), 4 Ch. D. 511 ; 56 L. J. Ch. 775 ; *Re Browne's Policy*, [1903] 1 Ch. 88 ; 72 L. J. Ch. 85.

One of the grantees not capable.

If the limitation be to two, and one cannot take, the other shall ake the whole ; as if there is a gift at common law to a man and is first-born son, when he has no son : Y. B. 18 Edw. 3 (1344), 59 ; r to a man and to such woman as he shall marry, in either case, e man takes the whole : *Shelley's Case* (1581), 1 Rep. 93 b at . 101 a. The point is discussed in *Davies* v. *Kempe* (1664), arter, 2, at p. 5 ; *S. C. sub nom. Davy* v. *Kemp*, O. Bridg. 384, t p. 387 ; *Humphrey* v. *Tayleur* (1752), 1 Amb. 136 ; 1 Dick. 161 ases on wills).

"Joint and natural lives."

"During their joint and natural lives," held to mean during eir joint lives, and during the natural life of each of them : this onstruction was helped by the context : *Smith* v. *Oakes* (1844), 14 im. 122.

Benefit of survivorship.

Words stating that joint tenants for life are to have the benefit f survivorship, do not prevent them from being joint tenants : o. Litt. 191 a.

Jointly and severally.

"Jointly and severally" creates a joint tenancy : *Slingsby's ase* (1586), 5 Rep. 18 b, at p. 19 a ; Jenk. Cent. 262, ca. lxiii.

At common law.

A remainder limited at common law to the heirs of A and B, wo living persons, makes them tenants in common, because their states do not begin at the same time : Co. Litt. 188 a ; Y. B. 24 dw. 3 (1550), 29 a, cited *Justice Windham's Case* (1588), 5 Rep. b, at p. 8 a ; *Sammes' Case* (1609), 13 Rep. 54 b, at p. 57.

Title by Statute of Limitations.

Two persons were in lawful possession of land as tenants under tenant for life ; on her death they remained in possession without aying rent till they had acquired a title under the Statute of imitations. *Held*, that they were joint tenants, as they had cquired title at the same instant : *Ward* v. *Ward* (1871), L. R. 6 h. 789.

Under the Statute of Uses (now repealed).

"If a man make a feoffment *to the use* of himself and of such ife as he should afterwards marry for term of their lives, and fter he taketh wife, they are joint tenants, and yet they come to eir estates at several times" : Co. Litt. 188 a ; Gilbert's Uses and rusts, p. 71 (3rd ed., p. 135, n. 10) ; 2 Bl. Com. 182 ; *Mutton's ase* (1567), Dy. 274 b ; Moore 96, pl. 240 ; 1 Anders. 42, ca. cvi ; Leon. 223 ; *Brent's Case* (1574), Dy. 340 a ; 2 Leon. 14 ; *Shelley's ase* (1581), 1 Rep. 93 b, at p. 101 a ; *Woodliff* v. *Drury* (1594), ro. Eliz. 439 ; *Sammes' Case* (1609), 13 Rep. 54 b, at p. 56 b.

Exceptions.

There are certain exceptions to the rule that a limitation to

several creates a joint tenancy. The most important of these as follows :—

The Crown.

First. The Crown cannot be joint tenant or tenant in comm with a subject, but takes the whole. This exception extends chattels, real and personal : 2 Bl. Com. 184, 409.

Land was demised for years to husband and wife : the husba committed suicide. *Held*, that the term escheated to the Cro for the felony : *Hales* v. *Petit* (1561), Plowd. Comm. 2 apparently on the ground that the escheat occurred prior to husband's death.

Corporations aggregate.

Second. Two corporations aggregate, or a corporation aggreg and a natural person, cannot be joint tenants at common la Bacon's Abridgment (7th ed.), Joint Tenants, B; Comyns' Dige Estates by Grant, K 2 (5th ed., vol. 4, p. 107); Williams' Saund (5th ed., vol. 2, pt. 2, p. 318, n. (4)); 2 Blackst. Com. 184.

This exception applies to chattels real and personal : 2 R Abr. 91, L 4, "Joint Tenants and Tenants in Common *Law Guarantee and Trust Society* v. *Bank of England* (1890), Q. B. D. 406.

Modern statutes *contra.*

But by the National Debt (Stockholders' Relief) Act, 1892, s. "Stock may be transferred to and held in the names of individual and a body corporate, or of two or more bodies corpora and any such holding shall in its relation to the Bank [*sc.* England or of Ireland, see section 9] be deemed a joint tenanc Stock in the Act means "all stock for the time being transferable the books of the Bank except so far as there is anything the contrary in any Act under which the stock was create (section 8).

And by the Bodies Corporate (Joint Tenancy) Act, 1899 body corporate shall be capable of acquiring and holding any r or personal property in joint tenancy in the same manner as i were an individual; and where a body corporate and an individu or two or more bodies corporate, become entitled to any s property under circumstances, or by virtue of any instrume which would, if the body corporate had been an individual, h created a joint tenancy, they shall be entitled to the property joint tenants, and on a dissolution of a body corporate the prope shall devolve on the other joint tenant.

Corporations sole.

Third. Two corporations sole, or a corporation sole and natural person, cannot be joint tenants of land; this except does not extend to chattels, real or personal : Co. Litt. 189 b, 190 Comyns' Dig., Estates by Grant, K 1 (5th ed., vol. 4, p. 10 2 Blackst. Com. 184, 409.

Husband and wife.

Fourth. A limitation made or trust declared, in deeds execu prior to 1883, to or for husband and wife, in words which wo

ıve made them joint tenants if they had not been husband and ife, creates in them a tenancy by entireties : *Green* v. *King* (1778), Wm. Bl. 1211; *Ward* v. *Ward* (1880), 14 Ch. D. 506; a con- quence of which was that, under such a limitation made to ısband and wife, and a stranger, the husband and wife took one oiety only, and the other person the other moiety : Litt. s. 291;). Litt. 187 a; *Back* v. *Andrew* (1690), 2 Vern. 120; Prec. Ch. 1; *ordon* v. *Whieldon* (1848), 11 Beav. 170; 18 L. J. Ch. 5; 83 . R. 132 (a case of a legacy).

Husband and wife and a stranger.

The same construction is placed on a grant to husband and wife ıd a third person in common : *Re Wylde* (1852), 2 D. M. & G. 24, at p. 728; 22 L. J. Ch. 87; 95 R. R. 307 (a case on a gacy).

In deeds executed after 1882 the husband and wife take as joint nants : *Thornley* v. *Thornley*, [1893] 2 Ch. 229; 62 L. J. Ch. 370; ut if they take conjointly with a stranger they still only take one ıare between them, the wife taking one moiety of that share for er separate use : *Re March* (1884), 27 Ch. D. 166; 54 L. J. Ch. 43; *Re Jupp* (1888), 39 Ch. D. 148; 57 L. J. Ch. 774 (both ıses on wills); the reason being that the Married Women's roperty Act, 1882, does not affect the construction of the eed.

New Law.

These last two cases are overruled by section 37 of the Law of roperty Act, 1925, in so far as dispositions made or operating after 925 are concerned. Subject to the above a husband and wife, for ll purposes of acquisition of any interest in property, are to be reated as two persons. See also First Schedule, Part VI of the bove Act.

Rents reserved to coparceners.

Fifth. A rent granted by one coparcener to other coparceners nd their heirs for equality of partition, and a rent reserved to oparceners and their heirs on a feoffment made by them in fee, o in coparcenery : Co. Litt. 169 b; *Justice Windham's Case* (1588), Rep. 6 b, at p. 8 a; Y. B. 38 Edw. 3 (1364), 26 b; Y. B. 15 Ien. 7 (1499), 14.

Executory instruments.

Sixth. The tendency of the Courts is to construe words in an xecutory instrument importing joint tenancy as giving a tenancy n common : *Taggart* v. *Taggart* (1803), 1 Sch. & Lef. 84; 9 R. R. 9; *Mayn* v. *Mayn* (1867), L. R. 5 Eq. 150; but *Bustard* v. *Saunders* (1843), 7 Beav. 92; 64 R. R. 23; and *Re Bellasis' Trust* 1871), L. R. 12 Eq. 218, are *contra*.

Joint tenants tenants in common in equity.

Moreover, there are certain cases in which, though a joint enancy is created at law, the parties are in equity tenants in ommon. The most important of these cases are :—

Purchase by several paid for unequally.

First. Where a purchase is made by several, and is paid for by hem in unequal shares : *Robinson* v. *Preston* (1858), 4 K. & J.

505; 27 L. J. Ch. 395; 116 R. R. 432; if the money is paid in eq shares, they are joint tenants: *Lake* v. *Gibson* (1729), 1 Eq. Ca. 290, pl. (3); *Aveling* v. *Knipe* (1815), 19 Ves. 441; 13 R. R. (where there was only an agreement to purchase); unless conveyance is made to one only: *Morris* v. *Barrett* (1829), 3 Y. & 384; 53 R. R. 246; or an intention to hold in severalty is found the surrounding circumstances: *Edwards* v. *Fashion* (1712), Pr Ch. 332; *Robinson* v. *Preston* (*supra*); direct evidence of intent to that effect is inadmissible: *Harrison* v. *Barton* (1860), J. & H. 287.

Evidence of circumstances.

Purchase for purposes of trade.

Second. Where a purchase is made by several for the purpose joint trade: Co. Litt. 182 a; Lindley on Partnership, Bk. I c. 5, s. 1 (9th ed.), p. 430; *Hamond* v. *Jethro* (1611), 2 Brownl G. 97, at p. 99; *Jeffereys* v. *Small* (1683), 1 Vern. 217; *Lake Gibson* (1729), 1 Eq. Ca. Ab. 290, pl. (3); *S. C.* affirmed on appe *sub nom. Lake* v. *Craddock* (1732), 3 P. Wms. 158; *Lyster Dolland* (1792), 1 Ves. Jun. 431, at p. 435. See the remarks Lord Eldon, C., in *Jackson* v. *Jackson* (1804), 9 Ves. 591, p. 596; 53 R. R. 13; *Davies* v. *Games* (1879), 12 Ch. D. 8 Partnership Act, 1890, s. 20. The question whether the prope is to become part of the partnership estate depends on all circumstances of the case: Lindley on Partnership, Bk. III, c (9th ed.), pp. 415 *et seq.; Bank of England Case* (1861), 3 D. F J. 645; 30 L. J. Bkcy. 25; 130 R. R. 276.

Mortgagees.

Third. Persons advancing money on mortgage, even in eq shares: *Petty* v. *Styward* (1632), 1 Rep. Ch. 31; 1 Eq. Ca. Ab. 2 *Rigden* v. *Vallier* (1751), 2 Ves. Sen. 252, at p. 258; 3 Atk. 7 at p. 734; *Re Jackson* (1887), 34 Ch. D. 732; 56 L. J. Ch. 593. *Morley* v. *Bird* (1798), 3 Ves. 629, at p. 631; 4 R. R. 1 Arden, M.R., draws a distinction between mortgagees and vol teers taking under a will or deed of gift; and see *per* P Wood, V.-C., *Harrison* v. *Barton* (*supra*), at p. 292.

A consequence of the last-mentioned equitable doctrine was t in all mortgages made prior to 1882 to more than one mortgagee was usual to insert a joint account clause stating that the mo belonged to the mortgagees jointly in equity as well as at l as in the absence of such a clause the receipt of the survivors of mortgagees was not a good discharge; but such a clause rendered unnecessary in mortgages made since 1881, by section of the Conveyancing Act, 1881 (replaced without any substan alteration by section 111 of the Law of Property Act, 1925), wh enacts that in mortgages made since 1881, to secure mo expressed to be advanced on a joint account, or to more than mortgagee jointly, the money shall as between the mortgag and the mortgagor be deemed to be and remain money belonging

hem on a joint account, and that the receipt of the survivors or ast survivor shall be a complete discharge.

The cases in which equity holds that there is a tenancy in ommon are all collected in the notes to *Lake* v. *Gibson*, 2 W. & 'ud. L. C. Eq. 973 (8th ed.).

A limitation to, or trust for, several, either *nominatim* or as a class, with any words implying a distinctness of interest, makes them tenants in common.

Tenancy in common.

"Equally to be divided": see *Anon.* (1685), 2 Vent. 365; *'isher* v. *Wigg*, *Wiggs* or *Wicks* (1700), 1 P. Wms. 14; 12 Mod. 96; Holt, 369; 1 Ld. Raym. 622; 1 Salk. 391; 3 Salk. 206; Com. tep. 88, 92; Lilly's Entries, 205; *Rigden* v. *Vallier* (1751), 2 'es. Sen. 252; 3 Atk. 731; *Goodtitle* v. *Stokes* (1753), 1 Wil. 341.

Examples.

"In rateable and equal manner": *Bois* v. *Roswell* (1668), Lev. 232.

Grant to L, T and S respectively, their respective executors, etc., f an annuity for the life of P, charged on certain lands, habendum) L, T and S, their respective executors, etc., for the life of P. 'he deed contained covenants by P, with L, T and S, their espective executors, etc. The consideration was advanced in equal nares by L, T and S. *Held*, that L, T and S took the annuity in qual shares as tenants in common: *Fleming* v. *Fleming* (1855), 5 r. Ch. R. 129.

"Jointly and severally," creates a joint tenancy: *Slingsby's 'ase* (1586), 5 Rep. 18 b, at p. 19 a; Jenk. Cent. 262, ca. lxiii.

Jointly and severally.

Voluntary settlement after a life estate to A, and in default of ssue of A, "to the use of the right heirs of E, deceased, and J, he two sisters of the said A, their heirs and assigns, as tenants in ommon for ever." *Held*, that J took a vested remainder in fee in moiety, E having left an only son as her heir: *Hawes* v. *Hawes* 1880), 14 Ch. D. 614.

Where the words implying distinctness of interest are followed y an express gift to the survivor, there is a tenancy in common ith a gift over to the survivor: *per* Lord Westbury in *Taaffe* v. *onmee* (1862), 10 H. L. C. 64, at p. 78; 138 R. R. 35, a case on a ill; there does not appear to be any case on a deed.

Gift over to survivor.

It is worth noting that after 1925 joint tenancy is the only rm of co-ownership that can exist at law.

New Law.

CHAPTER XXIII.

NEXT-OF-KIN—EXECUTORS—PERSONAL REPRESENTATIVES.

Next-of-Kin are not Persons entitled under Statute of Distributi Reference to Intestacy: Next-of-Kin take as Joint Tenan Persons entitled under the Statute take as Tenants in Commo Neither Husband nor Wife is included in Next-of-Kin: [Alit after 1925]: Persons taking prior Interests not excluded fr Next-of-Kin: Next-of-Kin ascertained at Death of Propositu Artificial Class may be created: Meaning of "Then": Trust Executors of A is Trust for A: Executors and Next-of-K distinguished: Executors take for benefit of Estate of Decease "Personal Representatives" means Executors: But by Conte may mean Next-of-Kin: "Next-of-Kin or Personal Rep sentative": "Legal Representatives": "Representatives."

Next-of-kin does not mean next-of-kin according to Statute of Distribution.

THE ultimate trusts of personalty in marriage settlements often declared in favour of next-of-kin, and it is consequen necessary to determine who are meant by that expression.

> "Next-of-kin" means the nearest blo relations to the propositus, not the next-of-k according to the Statute of Distribution (*a* 22 & 23 Car. 2 (1670), c. 10.

"The words 'nearest and next-of-kin' are perfectly exen from ambiguity, and in their general sense unquestionably denote persons nearest in proximity of consanguinity. . . . No evide exists that the parties intended to refer to the Statute. The Stat clearly adverts to two classes, next-of-kin in equal degree, and ne of-kin by right of representation; not confounding but expres distinguishing them": *per* Plumer, M.R., *Brandon* v. *Bran* (1819), 3 Swan. 312, at p. 318; 2 Wils. Ch. 14, at p. 21. T decision was mentioned with approval by the Lords Commission Shadwell and Bosanquet, in *Elmsley* v. *Young* (1835), 2 My. & 780, in which case *Phillips* v. *Garth* (1790), 3 Bro. C. C. 64, a *Hinckley* v. *Maclarens* (1832), 1 My. & K. 27, which are *cont* were overruled.

"The common use which is made of the term 'next-of-kin,' connection with the administration and distribution of perso

(*a*) This is the correct title as given by the Short Titles Act, 1896, but will be seen, it has in the past been referred to as the "Statute of Distributio

tates in cases of intestacy, may occasionally have given rise to a tion, that the persons to whom the law gives the succession are gally and for all purposes to be considered as the next-of-kin; yet is does not appear to be a notion which can be supported in law. e construction given to the term 'next-of-kin,' with reference to e Statute of Charles II, 22 & 23 Car. 2 (1670), c. 10, shows that e next-of-kin entitled to administration and distribution are not emed to be next-of-kin for all purposes; and I apprehend that, all other cases, the terms 'next or nearest of kin' must be conrued according to their simple and obvious meaning, or according the legal construction of the whole instrument in which they cur": *per* Lord Langdale, M.R., *Withy* v. *Mangles* (1841), 4 eav. 358, at p. 367; 10 L. J. Ch. 391, at p. 394; 59 R. R. 95.

"The Statute of Distributions accurately preserves the distinc- on between 'next-of-kin' and those to whom it directs the stribution of the personalty. If there be no children, it directs e distribution of the estate equally to every of the next of kindred the intestate, who are in equal degree, and those who legally present them; and then confines the representation within others' or sisters' children; not treating the rights of those who ke by representation as belonging to them as next-of-kin, but as rived from others, who, if they had lived, would have been next- -kin. If the familiar expression 'next-of-kin under the Statute' considered as having reference to this provision of the Statute, will not be found to be so inaccurate as has been supposed. The estion, however, is not whether 'next-of-kin under the Statute' as not been inaccurately used as describing those who are entitled nder the Statute, but whether the term 'next-of-kin,' without any ference to the Statute, has received any such judicial construction. short examination of the cases will show that the contrary is tablished by a very great preponderance of authority. . . . I ink that the appellant has wholly failed in proving that the term *ext-of-kin*, used *simpliciter*, has by a technical or conventional onstruction obtained the meaning of 'those who would be entitled case of intestacy under the Statute of Distributions': and I am, erefore, of opinion that these words must be construed in their atural and obvious meaning of nearest in proximity of blood": *er* Lord Cottenham, C., *Withy* v. *Mangles* (1843), 10 Cl. & F. 215, pp. 248, 249, 253.

It was held in *Re Morgan*, [1920] 1 Ch. 196; 89 L. J. Ch. 97 (a case on a will) that the expression "the Statutes of Distribution" meant the Act of Charles II (22 & 23 Car. 2, c. 10) and e continuing and amending Act of James II (1 Jac. 2, c. 17), nd did not include the Intestates' Estates Act, 1890.

"Statutes of Distribution."

The expression in a will "under the statute for the distribution

of the estates of intestate persons" held to mean no more tl if the words "by law" had been substituted therefor: *Re Hugl* [1916] 1 Ch. 493; 85 L. J. Ch. 476.

"Next-of-kin of equal degree."

It has been held that "next-of-kin of equal degree" mean ne of-kin *simpliciter: Anon.* (1815), 1 Madd. 36; but that " persons legally entitled thereto as the next-of-kin of A" mean statutory next-of-kin: *Kidd* v. *Frasier* (1851), 1 Ir. Ch. R. 518

Reference to intestacy.

An express reference to intestacy is equivalent to a reference the Statute: *Re Gray's Settlement*, [1896] 2 Ch. 802; 65 L. J. 858; but this is not the case where the reference is to death "

Death "unmarried."

and unmarried": *Re Webber's Settlement* (1850), 17 Sim. 2 19 L. J. Ch. 445; 83 R. R. 343; "as if she had not been married *Lucas* v. *Brandreth* (No. 2) (1860), 28 Beav. 274; 126 R. R. 1 or "unmarried": *Halton* v. *Foster* (1868), L. R. 3 Ch. 5 37 L. J. Ch. 547 (a case on a will).

"Own blood."

A trust for the next-of-kin of A "of his own blood and famil does not exclude next-of-kin of the half-blood: *Cotton* v. *Scaran* (1815), 1 Madd. 45; 15 R. R. 208 (the head-note that the next kin under the Statute took is inaccurate; no such decision given); *Brigg* v. *Brigg* (1885), 33 W. R. 454; 54 L. J. Ch. 464; a trust for the "next-of-kin in blood" of A is the same as a tr for the next-of-kin, and does not exclude the implication o reference to the Statute where such implication would otherv arise: *Re Gray's Settlement* (*supra*).

Where the will of a domiciled Englishman contained a beq to the "next-of-kin" of a German, it was held that the next-of- must be ascertained according to English law, and that a siste the half-blood was entitled, to the exclusion of nephews and ni who by German law would have had priority: *Re Fergusson's W* [1902] 1 Ch. 483; 71 L. J. Ch. 360.

Next-of-kin take as joint tenants.

Under a limitation to, or trust for, next-of- *simpliciter*, they take as joint tenants.

In a marriage settlement the ultimate trust of the wife's prope was "for such person or persons as at the time of her death s be her next-of-kin." The wife died, leaving a father, mother, child. *Held*, that they took as joint tenants: *Withy* v. *Man* (1841), 4 Beav. 358; 10 L. J. Ch. 391; 59 R. R. 95; (1843), Cl. & F. 215.

Realty limited to "next-of-kin."

Where the words were, "for the next-of-kin as if she had been married, and not including the husbands of both or eithe her sisters." *Held*, that the sisters who were her next-of-kin t as joint tenants, and the property being realty and there b no words of limitation, that they took for life only: *Lucas* *Brandreth* (*supra*).

Statutory next-of-kin take as tenants in common.

Under a limitation or trust of personalty in favour of the next-of-kin according to the Statute, they take as tenants in common, in the shares specified in the Statute.

Ultimate trust in a marriage settlement of wife's property "for ich person or persons as at the time of her death shall be her ext-of-kin under and according to the Statute made for the dis-ibution of the estates of persons dying intestate, but exclusively " " her husband "his executors, etc." *Held*, that the statutory ext-of-kin took as tenants in common: *Re Ranking's Settlement* 868), L. R. 6 Eq. 601.

Next-of-kin does not include husband or wife.

Neither in next-of-kin, nor in next-of-kin according to the Statute, is included the surviving husband or wife of the propositus.

"The description of next-of-kin of the wife can in no respect pply to the husband. He is entitled to the personal property of s wife *jure mariti*; her personal property vests in him by the arriage." (See now the Married Women's Property Act, 1882.) At the death of the wife, if it is necessary for him to have an dministration to enable him to get in her personal property, the dministration granted to him is granted to him as husband; and hen you look at the Statutes, there is no law that gives the usband a right by force of the Statute to administer to his wife. he husband's right is supposed in all the Statutes. The Statute 1 Hen. 8 (1529), c. 5, which directs who shall have administra-on, takes no notice of the husband: they are to grant it to the idow or the next-of-kin, or both. That Statute, therefore, does ot take the widow to be the next-of-kin. It takes no notice of the idower; for the law gives it to him; and where it was necessary or him to have the authority of the Ecclesiastical Court to enable im to obtain her personal property, he had a right to it. The tatute of Frauds (29 Car. 2 (1676), c. 3) has a clause (section 25) hat the Statute of Distributions (22 & 23 Car. 2 (1670), c. 10) shall ot prejudice the right of the husband; under an apprehension that is right might be considered to be affected by that Statute. The usband is not of kin to the wife, nor she to him. The Statute ives administration to the widow. She is not next-of-kin, but akes as widow": *per* Lord Loughborough, C., *Watt* v. *Watt* 1796), 3 Ves. 244, at p. 246; *Bailey* v. *Wright* (1811), 18 Ves. 49; 3 R. R. 151; *Cholmondeley* v. *Lord Ashburton* (1843), 6 Beav. 86; 2 L. J. Ch. 337; 63 R. R. 19; *Kilner* v. *Leech* (1847), 10 Beav. 62; 16 L. J. Ch. 503; *Noon* v. *Lyon* (1875), 33 L. T. (N.S.) 199.

New Law.

By virtue of section 46 of the Administration of Estates A 1925, the surviving husband or wife of the propositus is includ among the statutory next-of-kin; and in the case of docume made or coming into operation after 1925 references to any Statu of Distribution shall be construed by reference to the provisi of Part IV of the Administration of Estates Act, 1925, and ref ences in any such instrument to statutory next-of-kin shall construed, unless the context otherwise requires, as referring the persons who would take beneficially on an intestacy un the "foregoing provisions" of Part IV of the Act: section 50, s section 1 of the Administration of Estates Act, 1925. The Stat of Distribution (22 & 23 Car. 2, c. 10) is repealed by the Adm istration of Estates Act, 1925: see Second Schedule to that Act.

In a document made or coming into operation before 19 any reference to the Statutes of Distribution shall, unless the c trary thereby appears, be construed as referring to the enactme (other than the Intestates' Estates Act, 1890) relating to distribution of the effects of intestates in force immediately bef the Administration of Estates Act, 1925, came into force: section sub-section 2 of the Administration of Estates Act, 1925.

Persons taking under prior trusts may take under ultimate trust for next-of-kin.

Persons taking prior interests under the instr ment are not excluded from taking under a limit tion to, or trust for, next-of-kin, or next-of-k according to the Statute.

In *Elmsley* v. *Young* (1835), 2 My. & K. 82 and 780, the ten for life took under an ultimate trust for the next-of-kin: and *Smith* v. *Smith* (1841), 12 Sim. 317; *Withy* v. *Mangles* (184 10 Cl. & F. 215; 59 R. R. 95; and *Upton* v. *Brown* (1879), Ch. D. 872; 48 L. J. Ch. 756, a child who took an interest c tingently on his attaining twenty-one, but who died under t age, took under the ultimate trust for the next-of-kin.

Next-of-kin ascertained at death of propositus.

The "next-of-kin," or "next-of-kin or perso entitled according to the Statute," are to be asc tained at the death of the propositus.

By a marriage settlement a fund was settled on the wife, if should survive the husband, for life, remainder to their child who should attain twenty-one, etc.; in default of any such child, the husband should appoint; in default of appointment, in trust his next-of-kin according to the Statute and as if he had d intestate. There was issue one son only. The husband died f without having appointed; then the son died under twenty-one, a lastly the wife died. *Held*, that the fund vested in the son as

ther's next-of-kin at the father's death, and not in the persons ho would have been next-of-kin of the father if he had died at the n's death : *Smith* v. *Smith* (1841), 12 Sim. 317.

Personalty settled on marriage upon trusts for A (the husband) nd B (the wife), successively for life, and for the benefit of the ildren, with an ultimate trust "if B shall happen to die in the fetime of A, then the trustees shall and do, immediately after the eath of A and failure of issue," assign, etc., the residue of the rust funds and premises to such persons as B shall appoint, and n default of appointment, "in trust for such person or persons other than and except A) as shall *then* be the next-of-kin of B, nd would have been entitled thereto under the Statutes for the istribution of the personal estates of intestates, in case she had ied sole and unmarried and intestate"; B made no appointment; e died before A without having any issue. *Held*, that her next-f-kin at her own death, and not those who would have been her ext-of-kin if she had died at the death of her husband, were ntitled : *Wheeler* v. *Addams* (1853), 17 Beav. 417; 99 R. R. 215.

By marriage settlement personalty was settled on trust for the parate use of A (the intended wife) for life, with remainder for e issue of the marriage as B (the intended husband) should ppoint, and in default of issue, for B, if then living, or in case of is death, as he should by deed or will appoint, and in default of ppointment, "*then* upon trust immediately after the death of A ithout leaving B, or any child or children, grandchild or grand-hildren, her surviving, to pay the said principal sum and all terest which may *then* be due thereon to such person or persons s under the Statute of Distributions would *then* be entitled to the ame as the next-of-kin of B in case B shall have died intestate." made no appointment; he died before A, without having any sue. *Held*, that the statutory next-of-kin of the husband at his eath, and not those who would have been such if he had died at e death of the wife, were entitled to the fund under this ultimate mitation : *Day* v. *Day* (1870), Ir. R. 4 Eq. 385; 18 W. R. 417. ther cases are *Upton* v. *Brown* (*supra*); *Hunter* v. *Tedlie* (1880), L. R. Ir. 448, at p. 454.

Ultimate trust of personalty for the wife if she survived the usband, but if she died in his lifetime, "for the person or persons ho under or by virtue of the Statutes," etc., "would on her ecease have been entitled thereto in case she had survived her usband and had *then* died possessed thereof intestate." *Held*, at the wife's next-of-kin at the time of her death were entitled : *e Bradley* (1888), 58 L. T. (N.S.) 631; but Kay, J., in *Clarke* v. *ayne* (1889), 42 Ch. D. 529, refused to follow this case (see *fra*).

Artificial class may be created.

It may, however, be expressly stated that the next-of-kin, next-of-kin or persons entitled under the Statute, are to ascertained at some other time.

Examples.

Where the trust was "for such person or persons as at the ti of the death of A (the husband) shall be the next-of-kin of B (wife), and would be entitled to her personal estate as if she h died sole and unmarried," B died in the lifetime of A leavi five brothers, four of whom died in the lifetime of A. *Held*, th the surviving brother alone was entitled : *Re Webber's Settleme* (1850), 17 Sim. 221; 19 L. J. Ch. 445; 83 R. R. 343.

Meaning of "then."

Where the interest of the next-of-kin does not take effect possession at the death of the propositus the word "then" is n alone sufficient to prevent the rule applying, and to cause the ne of-kin to be ascertained at the time they take in possession.

It is pointed out by Thesiger, L.J., in *Mortimer* v. *Slater* (187 7 Ch. D. 322, at p. 329; 47 L. J. Ch. 134 (a case on a will), th there are three cases :—First, where the word "then" is attach to the description of the class—in which case the class is to ascertained at the time so pointed out, *i.e.*, the time of distributi Second, where words of futurity without any adverb of time a attached to the description of the class; in which case the cl is to be ascertained at the death of the propositus. Third, wh the word "then" is used, not in connection with the descripti of the class, but in connection with the time when the interest the class is to come into being; in which case the class is to ascertained at the death of the propositus. See also *Hunter* *Tedlie* (1880), 7 L. R. Ir. 448, at pp. 455, 456.

In *Pinder* v. *Pinder* (1860), 28 Beav. 44; 29 L. J. Ch. 527; 1 R. R. 16, where the ultimate trusts in a marriage settlement were "but if A (the wife) shall die in the lifetime of B (the husban then, after the decease of B and such failure of issue as aforesaid as A should appoint, and in default of appointment, "in trust the person or persons who, under the Statutes made for the dist bution of the estates of intestates, would then be entitled to the p sonal estate of A in case she had survived B and had died possess of the same intestate," to be divided, etc.; and in *Chalmers* v. *Nor* (1860), 28 Beav. 175; 126 R. R. 83; 3 L. T. (N.S.) 140, wh the trusts were "for such person or persons as, at the decease the wife, would, under the Statutes for the distribution of intestat effects, have been entitled to her personal estate, as her ne of-kin, in case she had survived her husband and afterwards d intestate"; it was held that the persons intended were those w would have been the wife's next-of-kin if she had survived a died immediately after her husband.

Ultimate trust of personalty after death of husband and w

or the person or persons who under the Statutes made for the tribution of the estates of intestates would *then* be entitled reto in case the *wife, having survived* the husband, were to die ssessed thereof and intestate, and to be divided," etc. The wife d in the husband's lifetime. *Held*, by Kay, J., that the persons take were not the wife's next-of-kin according to the Statute, but persons who would have been her next-of-kin according to the tute if she had died immediately after the husband : *Clarke* v. *yne* (1889), 42 Ch. D. 529. The learned Judge refused to follow *uitt* v. *Seaward* (1885), 31 Ch. D. 234; 55 L. J. Ch. 239 (a case a will), and *Re Bradley* (1888), 58 L. T. (N.S.) 631, cited *supra*. Real estate was settled, after other limitations, "to the use of and every the nearest of kin in equal degrees to D M at the time her death without issue, of the name of B, share and share alike tenants in common, their heirs and assigns," the Court intimated t the limitation would admit of four different constructions, . :—First, the union of both characters, *i.e.*, that the party ing should be the nearest of kin, and should also have the name B; secondly, that the party taking should be the nearest of kin the stock and blood; thirdly, that he should be the nearest of at the death of D M bearing the name of B; and fourthly, that should be the nearest of kin at the death of D M *born* of the ne of B; and without deciding which was the correct construction, d that the fourth was not : *Doe* v. *Plumtree* (1820), 3 B. & Ald. .

Next-of-kin of name of B.

A limitation or trust of personalty, in favour of the executors of a living person, or in favour of a living person for life, with remainder either mediately or immediately to his executors, vests the property absolutely in him, subject in the last-mentioned case to the rights of any persons taking in remainder after the life estate.

Trust for the executors of a living person is trust for him.

"If a man letteth lands to another for life, the remainder to him twenty-one years, he hath both estates in him so distinctly as may grant away either of them. . . . If a man makes a lease for to one, the remainder to his executors for twenty-one years, the n for years shall vest in him; for even as ancestor and heir are *relativa* as to inheritance, (as if an estate for life be made to A, remainder to B in tail, the remainder to the right heirs of A, fee vesteth in A as it had been limited to him and his heirs;) n so are the testators and the executors *correlativa* as to any ttel. And therefore if a lease for life be made to the testator, remainder to his executors for years, the chattel shall vest in

the lessee himself as well as if it had been limited to him and executors " : Co. Litt. 54 b.

Notwithstanding this extract from Coke, there seems to be s doubt whether a term limited to A's executors, as distinguis from A and his executors, to commence on A's death, vests in *Granew* v. *Parker* (1557), Benl. 74; *Cranmer's Case* (1571), D 309 a; *Spark* v. *Spark* (1598), Cro. Eliz. 666; (1600), Cro. E 840; (1602), Moore 666; Yelv. 9; Shep. Touch. 162; Hale's M Co. Litt. 54 b, n. 4.

Executors and next-of-kin distinguished.

" There is a great difference between a limitation to the execu and administrators and a limitation to the next-of-kin. The for is, as to personal property, the same as a limitation to the ri heirs as to real estate; but a limitation to the next-of-kin is lik limitation to heirs of a particular description; which would give the ancestor, having a particular estate, the whole property the land " : *per* Grant, M.R., *Anderson* v. *Dawson* (1808), 15 532, at p. 536.

The distinction between " executors " and " next-of-kin " is illustrated by *Grafftey* v. *Humpage* (1838), 1 Beav. 46; 8 L. Ch. 98; 49 R. R. 284, 784, on app. 3 Jur. 622, where, by a marri settlement, the ultimate trust of certain specified property of wife was for her next-of-kin; and the settlement containe covenant by the husband to settle the other property of the wife the same trusts as those of the specified property. At the dat the settlement certain property not mentioned in the settlem stood limited by a will on trust for the wife for life, remainde her children, remainder as she should appoint, remainder " to executors, administrators, or assigns." The husband survived wife; there were no children, and the wife made no appointm *Held*, that the last-mentioned property passed to the husban his wife's administrator, and was bound by the covenant.

" The authorities fully establish that the effect of a settlem by deed limiting property to the executor or administrator of settlor is to make such property subject to the disposition of settlor by will, or to be dealt with under the Statute of Distr tions; . . . and the settlor in such cases has a present control the property settled for his own benefit, or, in other words, settlor has as unlimited a power of disposition as he had before settlement " : *per* Lord Truro, C., *Mackenzie* v. *Mackenzie* (18 3 Mac. & Gor. 559, at p. 563; 21 L. J. Ch. 465, at p. 466; R. R. 101.

Where trust funds were settled to the separate use of a mar woman for her life, and after her death upon trust for such pers as she should by will appoint, and in default of appointment her executors or administrators, she (having become a wid

plied for a transfer of the funds to herself and assignees, offering release her power of appointment. *Held*, that she was absolutely itled to the trust funds : *Page* v. *Soper* (1853), 11 Ha. 321; 22 J. Ch. 1044; 90 R. R. 724; *Re Onslow* (1888), 39 Ch. D. 622; 57 J. Ch. 940. See also *Horseman* v. *Abbey* (1819), 1 Ja. & W. 1; 21 R. R. 188; *Collier* v. *Squire* (1827), 3 Russ. 467; 5 L. J. s.) Ch. 186; 27 R. R. 112; *Daniel* v. *Dudley* (1841), 1 Phil. 1; app. from and reversing 11 Sim. 163; *Allen* v. *Thorp* (1843), Beav. 72; and see *Webb* v. *Sadler*, [1873] 8 Ch. 419, at p. 429; L. J. Ch. 498.

"Executors or administrators of her own family."

Where in a marriage settlement the ultimate trust of the wife's tune was "for the executors and administrators of the wife's n family," and of the husband's fortune "for the executors or ministrators of the husband of his own family," it was held that the wife's case this meant her next-of-kin at her death, and in husband's case his executors or administrators : *Smith* v. *dley* (1838), 9 Sim. 125; but "executors or administrators" not mean next-of-kin : *per* Lord Cottenham, C., *Daniel* v. *dley* (1841), 1 Phil. 1, at p. 6; and "executors, administrators, l assigns" cannot mean next-of-kin : *per* Lord Langdale, M.R., *ifftey* v. *Humpage* (1838), 1 Beav. 46, at p. 52; 8 L. J. Ch. 98; R. R. 284, 784.

"Executors or administrators."

"Executors, administrators, and assigns."

Executors take for benefit of their testator's estate.

Any interest taken by the executors or administrators of A, under a trust for "A, his executors or administrators," or "the executors or administrators of A," is taken by them as part of A's estate : *Collier* v. *Squire* (1827), 3 Russ. 467; 5 L. J. (o.s.) Ch. 186; 27 R. R. 112; *Wellman* v. *Bowring* (1830), 3 Sim. 328; *Daniel* v. *Dudley* (1841), 1 Phil. 1; *Howell* v. *Gayler* (1842), 5 Beav. 157; 11 L. J. Ch. 398; *Morris* v. *Howes* (1845), 4 Ha. 599; *Mackenzie* v. *Mackenzie* (1851), 3 Mac. & G. 559; 21 L. J. Ch. 465.

The construction is not altered by the addition of the words "for ir own use and benefit" : *Hames* v. *Hames* (1838), 2 Keen, 646; L. J. Ch. 123; *Meryon* v. *Collett* (1845), 8 Beav. 386; 14 J. Ch. 369; 68 R. R. 123.

"It is extremely improbable that the settlor, executing a rriage settlement, and professing that his object was to make a vision for his intended wife, and the issue of the marriage, uld silently intend to make a provision for the person who uld chance to be his administrator—perhaps a small creditor—

perhaps a person to whom administration might be granted *dur minori aetate*, or upon some other contingency; and unless words are incapable of any other construction, and the Cou absolutely compelled, by force of them, to impute that hi improbable intention, that conclusion ought not to be adopte *Hames* v. *Hames* (1838), 2 Keen, 646, at p. 650; 7 L. J. Ch. "I think it . . . probable that his only object was . . . to words making it clear to the trustees that they might sa transfer the whole fund to his executors and administrators, he thereupon relieved them from their trust; that the fund to be disposed of by the executors or administrators without trustees being under the necessity of looking to its applicat and that the words were not used for the purpose of placing money in the hands of an executor or administrator for his personal enjoyment, but for the purpose of enabling him to m a proper application of it, without the interference of the trust As far as the trustees were concerned, it was to be the abso property of the legal personal representatives" : *per* Lord Lang M.R., *Meryon* v. *Collett* (1845), 8 Beav. 386, at p. 394; L. J. Ch. 369, at p. 370; 68 R. R. 123. See also *Marshal Collett* (1835), 1 Y. & C. Exch. 232; 41 R. R. 254.

Freehold purchased by lessee's executors under option to purchase.

Covenant in lease of land by lessor with the lessee, ' executors, administrators, and assigns," that if the lessee, executors, administrators, or assigns, should at any time there be desirous of purchasing the fee simple of the demised land, should give notice in writing to the lessor, his heirs, and assi then the lessor, his heirs, and assigns would accept a named for the purchase of the fee simple, and on receipt thereof w convey the fee simple to the lessee, his heirs or assigns, or a or they should direct. *Held*, that the option to purchase attached to the lease and passed with it; that on the death of lessee intestate it consequently passed with the lessee's pers estate to his administrator, but that the administrator, who also his heir, could not make a good title to the fee simple, w he had purchased under the option, without the concurrence of statutory next-of-kin of the lessee : *Re Adams and The Kensin Vestry* (1883), 24 Ch. D. 199; 52 L. J. Ch. 758; on app. 27 D. 394.

Personal representatives means executors.

A trust of personalty for the "personal re sentatives" of A is a trust for his executors administrators in their representative character.

"I take it to be clear that I must construe the words ' person or persons as shall be her personal representative or re

tatives ' according to their ordinary meaning, and that ordinary aning is ' executors and administrators ' : that the words being a marriage settlement, as distinguished from a will, are not to taken as having other than their ordinary meaning, unless there omething in the context to give them a different meaning. The estion, then, is whether, upon the construction of this particular trument, the words have any other than their ordinary aning " : *per* Hall, V.-C., and he held that they had not : *Re st's Settlement Trusts* (1874), L. R. 18 Eq. 686, at p. 691.

For the statutory definition of " personal representative," see tion 55 (xi) of the Administration of Estates Act, 1925. **New Law.**

But the context may readily show that " personal representa- es " means statutory next-of-kin. Next-of-kin held entitled on context.

The statutory next-of-kin were held entitled in *Wilson* v. *kington* (1847), 11 Jur. 537; 16 L. J. Ch. 169; 73 R. R. 768, ere there was a trust " to pay, apply, and dispose of unto and ongst the personal representatives of A in a legal course of ministration "; in *Briggs* v. *Upton* (1871), L. R. 7 Ch. 376; L. J. Ch. 519, where the words were " pay unto the legal resentatives of A in a due course of administration "; and in *binson* v. *Evans* (1873), 22 W. R. 199; 43 L. J. Ch. 82, where words were " in trust for the person or persons who should ppen to be the legal personal representatives or representative A at the time of her death " (in each of these cases the words xecutors and administrators " were used in other parts of the ed).

Ultimate trust of personalty in a marriage settlement " for the xt-of-kin or personal representative " of the wife. *Held*, that wife's next-of-kin and not her husband, as her administrator, s entitled : *Bailey* v. *Wright* (1811), 18 Ves. 49; 18 R. R. 151; app. (1818), 1 Swanst. 39 (in this case there was no contest ween the next-of-kin and the statutory next-of-kin). "Next-of-kin or personal representative."

" Next-of-kin or personal representative of A in a due course of ministration according to the Statute of Distributions," means statutory next-of-kin to the exclusion of the widow of A : *Kilner Leech* (1847), 10 Beav. 362. [*But by the Administration of tates Act, 1925, references in documents made or operating after 25 to the Statutes of Distribution or to statutory next-of-kin will lude the widow: sections 46 and 50, Administration of Estates t, 1925.*] **New Law.**

Settlement of personalty on failure of children of the marriage on trust to pay a portion of the funds " unto my cousin H or her al representatives," another portion " to my cousins A and M, or ir legal representatives, equally between them." *Held*, that there re " three possible interpretations : . . . the words may mean "Legal representatives."

'executors or administrators' and be therefore merely what commonly called words of limitation; . . . or, if they are word substitution, they apply to the date of the settlement, and pro for the possible contingency of the persons named in it being d or they are void for uncertainty. Each of these constructions l to the same result" (*viz.*, that the named persons, who were li at the date of the settlement, took absolutely): *Topping* v. *How* (1851), 4 De G. & Sm. 268; *S. C. sub nom. Tipping* v. *How* 15 Jur. 911.

"Representatives."

Trusts in a marriage settlement "for the persons (exclusiv A and his representatives) who under the Statute of Distributi would have become entitled if the wife had died a *feme sole* intestate." A was the wife's brother: on her death he was d leaving three daughters surviving. *Held*, that representat meant those who under the Statute represented the brother as n of-kin of the wife, and consequently that A's daughters v excluded: *Lindsay* v. *Ellicott* (1876), 46 L. J. Ch. 878.

CHAPTER XXIV.

MARRIAGE—WIFE—CHILDREN—ISSUE.

arriage: Marriage not Solemnised: Marriage Annulled: Remarriage: Restraint of Marriage: Wife: Coverture: Effect of Decree for Judicial Separation : Separation : " Unmarried ": " Without having been Married ": Children : Children includes Child en ventre : Born includes to be born : Children means Legitimate Children : Limitations for unbegotten Illegitimate Children void : Issue means Descendants : Context may confine it to Children : Reference to Parent : Child, Children and Issue are Words of Purchase.

THERE are collected in this chapter divers cases on words which ten occur in deeds, particularly in marriage settlements, but are ot words of limitation.

Marriage.

" Marriage " means a valid and effectual marriage, and " solemnised " means validly and effectually solemnised.

Invalid marriage.

A deed was executed whereby " in consideration of the intended arriage between A and B," personalty of the intended husband as settled, and it was agreed that the intended wife's real estate ould be settled. The marriage ceremony was performed. A onveyance was made in pursuance of the agreement, and afterards it was discovered, before any issue born, that the marriage as invalid. A and B thereupon separated and executed deeds urporting to revoke the prior settlement and conveyance. They ubsequently executed a new settlement, and afterwards were validly arried. *Held*, that, although the legal estate passed by the conveyance made in pursuance of the first settlement (*Boughton* v. *andilands* (1811), 3 Taunt. 342), a Court of equity would not hold e parties bound either as to the realty or the personalty by the rst settlement, since it was founded on the misapprehension of e parties, who believed that they were to be validly married : *obinson* v. *Dickenson* (1828), 3 Russ. 399; 7 L. J. (o.s.) Ch. 70.

Marriage within prohibited degrees.

A settlement of property of a woman who had gone through the eremony of marriage with her deceased sister's relict was set aside the instance of the woman, who was described therein as a wife, n the ground of total failure of consideration : *Coulson* v. *Allison* 1860), 2 Giff. 279; 2 De G. F. & J. 521; 129 R. R. 176.

Where a man went through the ceremony of marriage with deceased wife's sister, and prior thereto made a settlement consideration of the intended marriage, and declared a trust of settled property in favour of himself till the solemnisation of marriage, it was held that, inasmuch as the marriage could not legally solemnised, the trust for him was absolute : *Chapman Bradley* (1863), 33 Beav. 61; 4 De G. J. & S. 71; 33 L. J. 139; 146 R. R. 230; *Pawson* v. *Brown* (1879), 13 Ch. D. 2 *Neale* v. *Neale* (1898), 79 L. T. 629.

A widower, in contemplation of a marriage "which had b agreed upon and was intended shortly to be solemnised" betw himself and Clara P. (who was his deceased wife's sister), conve realty to trustees to the use of himself for life, remainder to use of Clara P. during her life, "provided she shall remai widow and unmarried, and after her decease or marriage, wh event shall first happen," to the use of the person who would entitled thereto if the deed had not been executed. *Held*, North, J., on a summons issued by the trustees, that the limitat of the life interest to Clara P. was illegal and invalid, and that took no interest in the property : *Phillips* v. *Probyn*, [1899] 1 811; 68 L. J. Ch. 401, distinguishing *Ayerst* v. *Jenkins* (187 L. R. 16 Eq. 275; 42 L. J. Ch. 690, on the ground that in that c all that was decided was that the settlor could not set aside suc settlement.

[Marriages with a man's deceased wife's sister were rende legal by the Deceased Wife's Sister's Marriage Act, 1907, with a deceased brother's widow by the Deceased Brothe Widow's Marriage Act, 1921.]

Marriage not solemnised.

A covenanted in consideration of (amongst other matters) intended marriage to settle lands to the use of the intend husband and wife and the heirs of the body of the husband, afterwards conveyed the lands to those uses. The marriage was solemnised. *Held*, that the intended husband and wife took joint tenants for life : *Jones* v. *Boyleson* (1634), Wm. Jo. 345.

Where the marriage was not solemnised, but the parties cohabi and issue was born, it was held that the contract for the marri mentioned in the settlement was entirely put an end to, and t the property of the intended wife which had been vested in trustees of the settlement must be re-transferred to her : *Essery Cowlard* (1884), 26 Ch. D. 191; 53 L. J. Ch. 661; 32 W. R. 518.

A settlement declared trusts of funds, which it was recited been transferred to the trustees by the proposed husband and intended wife's father, and provided that the intended wife's ot and after acquired property should be settled. It was executed the intended wife and her father, but not by the husband or

ustees, and the funds were never transferred to the trustees. he engagement was broken off. *Held*, that the deed should be ncelled : *Bond* v. *Walford* (1886), 32 Ch. D. 238; 55 L. J. Ch. 667.

Marriage annulled.

After a marriage had been annulled by the Court, the trustees ere ordered to revest the properties comprised in the settlement the parties by whom they had been vested in the trustees : *ddington*, falsely called *Mellor* v. *Mellor* (1884), 33 W. R. 232.

By an ante-nuptial settlement, in consideration of an intended arriage, the intended husband covenanted that if the intended arriage should take place he would, during the joint lives of himlf and his intended wife, pay to the trustees an annuity for the nefit of the intended wife. The marriage was solemnised and as afterwards annulled; it was held that the covenant could not e enforced because the marriage, which was only voidable until e declaration of nullity, had been thereby made void, but that the ourt had power, under the Matrimonial Causes Act, 1859 (22 & 23 ict. c. 61) (*a*), s. 5, and the Matrimonial Causes Act, 1878 1 & 42 Vict. c. 19) (*b*), s. 3, to vary the settlement so as to make e annuity available for the lady's benefit notwithstanding the ecree of nullity : *Dormer* v. *Ward*, [1901] P. 20; *Attwood* v. *ttwood*, [1903] P. 7.

Remarriage.

It should perhaps be observed that where a settlement purports be made in consideration of marriage, this means the then tended marriage, so that, in case of divorce at a time when there no issue, the ultimate trusts arise, notwithstanding the possibility the parties marrying each other again and having issue : *Bond* v. *aylor* (1861), 2 J. & H. 473; 134 R. R. 312.

Restraint of marriage.

A condition subsequent in partial restraint of marriage, *e.g.*, a ondition providing for the forfeiture of interests given by a settlent to a daughter of the settlor and her children upon her arriage at any time without the consent of named persons, is alid and enforceable if accompanied by a gift over : *Re Whiting's ettlement*, [1905] 1 Ch. 96; 74 L. J. Ch. 207.

A condition subsequent in restraint of marriage is only *prima cie*, and not *per se* void, see headnote, *Re Hewett*, [1918] 1 Ch. 58; 87 L. J. Ch. 209 (a case on a will).

" In this matter, however, the rules of construction are the same hether the instrument in question be a deed or a will : see *Re hiting's Settlement* " : *per* Younger, J., [1918] 1 Ch. 458, at 469. See also *Webb* v. *Grace* (1848), 2 Ph. 701, 702; 18 L. J. h. 13; 78 R. R. 252.

Wife.

In a post-nuptial settlement containing a power for the husband

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(*a*) Repealed by the Supreme Court of Judicature (Consolidation) Act, 1925.
(*b*) *Ibid.*

by deed, will, or codicil to appoint that, after his death or t determination during his life of a trust of income in his favou such income should be paid to his *wife*, wife means his then prese wife, and not any wife he may have : *Re Hancock*, [1896] 2 C 173; 65 L. J. Ch. 690.

Coverture.

Coverture means the period during which a woman is marrie and in a marriage settlement refers only to the marriage th intended : *Horseman* v. *Abbey* (1819), 1 Jac. & W. 381; 21 R. 188; *Morris* v. *Howes* (1845), 4 Hare, 599. It is determined divorce : *Re Crawford's Settlement*, [1905] 1 Ch. 11; 74 L. J. C 22, but not by a decree *nisi* : *Sinclair* v. *Fell*, [1913] 1 Ch. 155; L. J. Ch. 105.

Decree of judicial separation determines coverture *qua* property;

But, by virtue of section 25 (*c*) of the Divorce and Matrimon Causes Act, 1857 (20 & 21 Vict. c. 85), which provides that " every case of a judicial separation the wife shall from the date the sentence, and whilst the separation shall continue, be consider as a *feme sole* with respect to property of every description whi she may acquire or which may come to or devolve upon her coverture is, so far as regards the wife's property, determined by decree of judicial separation. Hence property acquired by her aft the decree is not caught by a covenant to settle property acquir during the intended coverture : *Dawes* v. *Creyke* (1885), 30 Ch. 500; 54 L. J. Ch. 1096; or during the intended marriage : *Dave port* v. *Marshall*, [1902] 1 Ch. 82; 71 L. J. Ch. 29.

And by 21 & 22 Vict. c. 108, s. 8 (*d*), property to which she at the date of the decree of judicial separation entitled in remainc or reversion is included in the protection given by the decree : *Insole* (1865), L. R. 1 Eq. 470; (1865), 35 Beav. 92; 35 L. Ch. 177; 147 R. R. 42.

But property to which the wife was entitled at the time of t marriage in reversion, but which fell into possession after t decree, was held to be caught by a covenant to settle property which she was entitled at the time of the marriage in possession reversion : *Davenport* v. *Marshall* (*supra*).

but not restraint on anticipation as regards property in possession.

The section does not apply to property of the wife's in possessi at the date of the decree, so that she is still restrained fr anticipating such property if it belongs to her without power anticipation : *Waite* v. *Morland* (1888), 38 Ch. D. 135; 57 L. J. C 655; *Hill* v. *Cooper*, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423.

But where a woman was deserted and subsequently a legacy w left to her for her separate use without power of anticipation, a subsequently she obtained a protection order whereby she w

(*c*) Repealed (so far as it relates to the High Court) by the Supreme Co of Judicature (Consolidation) Act, 1925.

(*d*) Repealed by the Supreme Court of Judicature (Consolidation) Act, 19

deemed to have been during such desertion of her in the like osition in all respects in regard to property . . . as she would be nder that Act if she obtained a decree of judicial separation," she as held entitled to payment of the legacy : *Cooke* v. *Fuller* (1858), 5 Beav. 99; 122 R. R. 43.

Separation.

Although a separation deed becomes inoperative if the parties ubsequently resume cohabitation : *Bateman* v. *Countess of Ross* 813), 1 Dow, 235; 14 R. R. 55; *Nicol* v. *Nicol* (1886), 31 Ch. D. 24; yet if the deed contains, beyond the provisions relating to the paration, trusts of property for the children of the marriage, such usts are not determined by the resumption of cohabitation : *uffles* v. *Alston* (1875), 19 Eq. 539; 44 L. J. Ch. 308; *Re Spark's rust*, [1904] 1 Ch. 451; 73 L. J. Ch. 259, compromised on appeal, 1904] 2 Ch. 121; and trusts in favour of the wife are not necesarily so determined : *Crouch* v. *Waller* (1859), 4 De G. & J. 302; 3 L. J. Ch. 514; 124 R. R. 266; *Negus* v. *Forster* (1882), 30 . R. 671; the question being one of construction : see *per* owen, L.J., *Nicol* v. *Nicol* (1886), 31 Ch. D. 524, at p. 529; 55 . J. Ch. 427; and where a *quasi*-separation deed was executed etween a man and his mistress, a covenant by him to pay her an nnuity was held to be operative, although they subsequently sumed cohabitation : *Re Abdy*, [1895] 1 Ch. 455; 64 L. J. Ch. 465; nd a proviso that if cohabitation is resumed the annuity shall cease void : *Ex p. Naden, Re Wood* (1874), 9 Ch. 670; 43 L. J. Bk. 105.

A covenant contained in an agreement between husband and ife that in the event of the husband assaulting the wife or onducting himself in such a manner as to entitle her to a eparation order he would pay his wife the sum of £150, the wife ovenanting that on payment of the sum of £150 she would not emand or receive any weekly sum that might be paid to her by e justices in consequence of such order being made. *Held* not be void as against public policy : *Harrison* v. *Harrison*, [1910] K. B. 35; 79 L. J. K. B. 133.

Unmarried.

Unmarried is a word of flexible meaning, but *prima facie* it eans never having been married, *i.e.*, a spinster : *per* Shadell, V.-C., *Smith* v. *Smith* (1841), 12 Sim. 317, at p. 326; *per* orth, J., *Blundell* v. *de Falbe* (1888), 57 L. J. Ch. 577; 58 L. T. 21. But it may mean not being married at the time predicated, *e.*, not having a husband then living : *Maugham* v. *Vincent* (1840), Jur. 452; 9 L. J. Ch. 329; 52 R. R. 260; *per* Wood, V.-C., *Re aunders' Trust* (1857), 3 K. & J. 152, at p. 156; *per* Lords Cranorth and Wensleydale, *Clarke* v. *Colls* (1861), 9 H. L. C. 601, at p. 612 and 615; 131 R. R. 363.

Where a settlement provided that if there should be more than e child of the intended marriage, and "all of them but one child

shall have died unmarried and without issue," and again, if all the children "shall have died unmarried and without issue," was held that "unmarried" meant "without ever having be married," because it was applied to a person not married at t time: *Heywood* v. *Heywood* (1860), 29 Beav. 9; 30 L. J. Ch. 15 131 R. R. 443.

In discussing *Heywood* v. *Heywood* (*supra*), and another cas Sargant, J., says: "But those decisions merely come to this that, though you may construe 'unmarried' in the phra 'unmarried and without issue' in its secondary meaning in t absence of other context, yet if you find a context which shows th the word 'unmarried' is still being used in its primary sense y are brought back to that primary meaning. In such cases there a conflict between the two contexts, and, if they are of equal forc or if the context in favour of the primary signification is t stronger, you retain that primary signification of the word": *Jones*, [1915] 1 Ch. 246, at p. 253; 84 L. J. Ch. 222.

The word most usually occurs in the ultimate trust of t intended wife's property in a marriage settlement, such proper being given, after her death, in default of issue of the marriage a an appointment by her to her next-of-kin "as if she had di intestate and unmarried," and in certain cases the word has be construed in such instruments to mean "not having a husba then living" in order to provide for children of the wife. Su cases are *Hoare* v. *Barnes* (1791), 3 Bro. C. C. 316, and *Maugha* v. *Vincent* (*supra*), on the ground that the settlement contained provision in default of appointment for the children of the marriag *Pratt* v. *Mathew* (1856), 22 Beav. 328; 8 D. M. & G. 522; 111 R. 386; and *Re Woodhouse's Trust*, [1903] 1 Ir. R. 126, on t ground that the settlement did not provide for the issue of t marriage in every possible event; *Re Saunders' Trust* (185 3 K. & J. 152, on the ground that there was no provision for t children of a subsequent marriage; and *Mitchell* v. *Colls* (186 Johnson, 674; *S. C.* in D. P. *sub nom. Clarke* v. *Colls* (*supra*), the ground that the settlement did not provide for the issue of t marriage in every possible event, nor, in default of appointment, the issue of a subsequent marriage; and in *Re Forbes*, [189 W. N. 6 (4), the words "died a spinster and intestate" were he to mean "discovert" on the ground that otherwise there was provision for a child of a previous marriage.

In certain settlements the phrase used is not "intestate a unmarried," but "intestate and without having been married."

Without having been married.

It is now settled that the phrase "without having been married is to be interpreted in its literal sense of "never having be married," unless "there is anything in the context or in t

rcumstances of the case which will justify" the Court "in parting from the natural and plain meaning of the words used": r Vaughan Williams, L.J., in *Re Brydone's Settlement*, [1903] Ch. 84, at p. 92; 72 L. J. Ch. 528; and see *per* Romer and Cozens-ardy, L.JJ., to the same effect, *ibid.*, at pp. 94 and 97; see also *e Ellis's Settlement*, [1920] 2 Ch. 432; 89 L. J. Ch. 577; affirmed n appeal [1921] 1 Ch. 230 (C. A.); [1920] W. N. 362; 90 L. J. h. 165; [1922] W. N. 93; but there are cases in which that xpression has been construed to mean "without having contracted e present marriage."

The cases in which this or a similar phrase has been interpreted e as follows:—

Re Norman's Trust (1853), 3 D. M. & G. 965; 22 L. J. Ch. 720; 3 R. R. 394, where it was held that "without being married" eant no more than "without having a husband at the time of her eath"; *Wilson* v. *Atkinson* (1864), 4 D. J. & S. 455, where the hrase "without having been married" was placed in such a ontext as to show that it was not meant to exclude an illegitimate hild who for the purposes of the settlement was to be regarded s legitimate; *Re Ball's Trust* (1879), 11 Ch. D. 270; 48 L. J. Ch. 79, where there was no other provision in default of appointment or the children, and Fry, J., held that a child took the funds as he person entitled under the Statutes of Distribution, thinking that he Lords Justices had laid down in *Wilson* v. *Atkinson* a general ule that "without having been married" meant without having husband living; *Upton* v. *Brown* (1879), 12 Ch. D. 872; 48 L. J. h. 756, where there was no absence of provision for children as in *e Ball's Trust*, but Fry, J., again followed the supposed rule in *Vilson* v. *Atkinson*; *Emmins* v. *Bradford* (1880), 13 Ch. D. 493; 49 . J. Ch. 222, where Jessel, M.R., construed the words "without ver having been married" according to their literal meaning, and aid that there was no general rule laid down in *Wilson* v. *Atkinson*; *e Arden's Settlement*, [1890] W. N. 204; *Stoddart* v. *Saville*, 1894] 1 Ch. 480; 63 L. J. Ch. 467, and *Re Mare*, [1902] 2 Ch. 112; 1 L. J. Ch. 649, in which Stirling, J., Chitty, J., and Kekewich, J., espectively followed the supposed rule in *Wilson* v. *Atkinson* in onstruing the words "without having been married" (in *Re rden's Settlement* the persons held to be entitled were the wife's sue by a subsequent marriage, and in *Stoddart* v. *Saville* there as no provision for the children of the marriage in default of ppointment); *Hardman* v. *Maffett* (1884), 13 L. R. Ir. 499, where he words were "without having been married," and Porter, M.R., aid there was no difference between them and "without ever aving been married," and followed *Emmins* v. *Bradford*; *Re eane's Trusts*, [1900] 1 Ir. R. 322, where the words were the

same as in *Hardman* v. *Maffett*, and the same Judge followed h previous decision; *Re Smith's Settlement*, [1903] 1 Ch. 373; 7 L. J. Ch. 184, where the words were the same as in *Emmins* v *Bradford*, and Swinfen Eady, J., followed Jessel, M.R.; and *R Brydone's Settlement* (*supra*), where the words were "witho having been married," and the Court of Appeal, followin Jessel, M.R., and Swinfen Eady, J. (and disapproving the contra opinions of Fry, Chitty, Stirling and Kekewich, JJ.), held that r general rule was laid down in *Wilson* v. *Atkinson*, and that th words must bear their ordinary interpretation.

In *Re Ellis's Settlement* (*supra*) the Court of Appeal and th House of Lords by majority judgments affirmed the decision Sargant, J., in the Court of first instance that there was no materi distinction between the expression "without having been married and the expression "without ever having been married," thoug the former expression was more flexible than the latter.

Children.

The primary meaning of the word "children is descendants of the first degree.

But "according to the authorities, grandchildren and grea grandchildren are all children and come within that to certa purposes, and in *Crooke* v. *Brookeing* (1689), 2 Vern. 106 (a case o a will), it is said in the conclusion that it is allowed by all if r children are in being, grandchildren would come in under the wo children, and may be thereby described": *per* Hardwicke, C *Wyth* v. *Blackman* (1749), 1 Ves. Sen. 196, at p. 201; *S. C. su nom. Wythe* v. *Thurlston*, Amb. 555 (a case on a deed); but that case the decision was that *issue* was not cut down by a subs quent reference to children. There does not appear to be any ca on a deed in which remoter descendants have taken under th description of children; and Hall, V.-C., referring to the abo stated opinion of Lord Hardwicke, said, "such a latitude construction is not now adopted": *Re Hopkins' Trusts* (1878), Ch. D. 131, at p. 137 (a case on a will); 47 L. J. Ch. 672.

[It may be noted that Younger, J., says in *Re Atkinson*, [191 2 Ch. 138, at p. 145; 87 L. J. Ch. 505, that "nothing in *Crooke* *Brookeing*" (*supra*), "now remains to justify the further citati of that case as an authority for anything."]

The cases on wills are collected in Theobald on Wills, c. 28, II Legitimate Children, 2 (7th ed.), p. 295.

"Children of wife."

"Younger children."

"Children of the wife," in a marriage settlement of th husband's property, means children of the wife by that husbanc *Dafforne* v. *Goodman* (1699), 2 Vern. 362. "Younger children" a settlement made, not in contemplation of marriage, by a widowe

o afterwards marries, includes his children by the second as well the first wife : *Brathwaite* v. *Brathwaite* (1685), 1 Vern. 334.

"Child and children or grandchild."

Ultimate trust in a marriage settlement in default of children of marriage "for all and every the child and children or grandld of Julia Gibson living at the decease of the survivor of the" sband and wife. *Held*, there being children of Julia Gibson living that date, that no grandchild took any share, the grandchildren ing a substitutional class to take only in the event of no child ing alive at the period of distribution, and not being substituted their own parents, as if the gift to children was a gift in joint nancy : *Re Coley*, [1901] 1 Ch. 40.

Trust for children includes child *en ventre*.

A limitation to, or trust for, children born or living at a given time, includes a child *en ventre* at that time and born afterwards: *Beale* v. *Beale* (1713), 1 P. Wms. 244.

In *Palmer* v. *Cracroft* (1706), 2 Vern. 578, where a posthumous n was excluded in favour of the next remainderman, it seems to ve been decided that the contingent remainder to the child could t take effect owing to its becoming unsupported on the father's ath, which, however, probably took place before the passing of e Statute mentioned below. The question was formerly conlered doubtful with regard to settlements of realty, and an Act 0 & 11 Will. 3 (1699), c. 16) (*e*), was passed, by which it is enacted at where an estate is settled in remainder on children, with mainder over, a posthumous child may take as if it had been rn in its father's lifetime, although there be no estate limited to ustees to preserve the contingent remainder. In *Millar* v. *urner* (1748), 1 Ves. Sen. 85, where by marriage articles provision s made for "such child or children of the marriage as should living at the death of the father or mother," a posthumous child s allowed to take its share.

10 & 11 Will. 3, c. 16.

Born includes to be born and *vice versa*.

Limitations to, or trusts for, children born, or begotten, include those thereafter born or begotten ; and *vice versa*.

"As *procreatis* shall extend to the issues begotten afterwards, *procreandis* shall extend to the issues begotten before" : Co. tt. 20 b.

"The words 'begotten and to be begotten' are the same, as ll upon the construction of wills as settlements, and take in all

(*e*) In the Statutes of the Realm, 10 & 11 Will. 3, c. 22. Now repealed by Law of Property (Amendment) Act, 1924, 10th Schedule.

the issue after begotten" : *per* Cowper, L.K., *Cook* v. *Co* (1706), 2 Vern. 544.

"'*Procreatis*' takes in children to be begotten, and '*pr creandis*' includes children then begotten" : *per* Parker, C., *Hew* v. *Ireland* (1718), 1 P. Wms. 426, at p. 427.

"There are numerous authorities from those referred to Co. Litt. 20 b, deciding that the word *procreandis* may be re *procreatis*, and vice versa" : *per* Wood, V.-C., *Gabb* v. *Prende gast* (1855), 1 K. & J. 439, at p. 442; 24 L. J. Ch. 431; 103 R. 169.

Husband and wife, having issue a daughter, settled £600 in tru for the wife for life, remainder in trust for "such daughter daughters as *shall* be begotten by the husband on the wife." T wife died without having had any other daughter. *Held*, that t daughter already born should take: *Hewet* v. *Ireland* (171 1 P. Wms. 426; 2 Eq. Ca. Ab. 139, pl. 9; Pre. Ch. 489; Gilb. E 145. This appears to be the case reported in 10 Mod. 398; Eq. Ca. Ab. 658, pl. 4, *sub nom. Slingsby* v. ——.

Limitations to use of settlor for life, remainder to his sons tail, remainder to the settlor's brother for life, with remainder " the heirs male of his body *hereafter* to be begotten." *Held*, th the brother took an estate tail, "the words hereafter to be begott do not confine it to the issue born after, but will likewise take in th born before: the words *procreatis* and *procreandis* being of the sa import. . . . And this was to prevent the great confusion whi would otherwise be in descents by setting in the younger before t elder" : *per* Lord Talbot, C., *Hebblethwaite* v. *Cartwright* (173 Cas. t. Tal. 31, at p. 32.

Context confining meaning.

The rule, however, is not inflexible, and may give way to sufficient context.

Feoffment in fee to the use of the settlor's *younger* son in ta and after to the use of the heirs of the settlor's body *in poster procreandis*. He had at the time of the feoffment an elder and younger son, and afterwards had issue a third son. The young son died without issue. *Held*, that the third son took, "for t word *in posterum* is a forcible word to create a special inheritan without that it had been a general tail" : *per* Wray, J., *An* (1583), 3 Leon. 87, ca. cxxvi. "The case, therefore did not tu entirely upon the effect of the words *in posterum procreandis* the feoffors passing by the eldest son in the first instance was very important circumstance to indicate an intention to exclu that son altogether" : *per* Lord Ellenborough, C., *Doe* v. *Hall* (1813), 1 M. & S. 124, at p. 136; 14 R. R. 408; and see Stirling, J., *Locke* v. *Dunlop* (1888), 39 Ch. D. 387, at p. 398; L. J. Ch. 1010.

Children means legitimate children, unless that meaning is excluded by the circumstances or the context.

Children *prima facie* means legitimate children.

Legitimate children include children born out of wedlock of sons who by subsequent marriage legitimatise the children, ere, at the time of the birth of the children and of the marriage, father is domiciled in a place where children born before rriage can be rendered legitimate by the subsequent marriage of parents : *Re Goodman's Trust* (1881), 17 Ch. D. 266; 50 L. J. 425; *Re Grove* (1888), 40 Ch. 216; 58 L. J. Ch. 57; but such dren cannot take land in England by descent : *Doe* v. *Vardill* 40), 2 Cl. & F. 571; 9 Bli. (N.S.) 32; 7 Cl. & F. 895; 51 R. R. . [As to deaths occurring after 1925 there can be no descent the heir and therefore the point raised in the last-named case not arise.]

" A man makes a lease to B for life, remainder to the eldest ie male of B and the heires males of his body. B hath issue a tard son; he shall not take the remainder, because in law he is his issue, for *qui ex damnato coitu nascuntur inter liberos non iputentur* " : Co. Litt. 3 b.

But an illegitimate child can take an estate by deed if sufficiently cribed, though further described as the child of his reputed ents. " So if a remainder be limited to *Rich. filio Rich.* rwood, it is good although he be a bastard, if in vulgar reputa- ı and knowledge he be known by such name, as the book is in Edw. 3 (1365), 11a, and yet in truth he is *nullius filius* " : *Sir yle Finch's Case* (1606), 6 Rep. 63, a, at p. 65 a.

Illegitimate child if properly described can take.

There are no modern cases on deeds in which the question ther illegitimate children can take under the description of dren has arisen, except the case of *Gabb* v. *Prendergast*, where re was an ultimate limitation of realty in a marriage settlement n trust for " all and every the child or children, as well those ady born as hereafter to be born, of F R and E his wife ally and their respective heirs and assigns." F R and E were ried at the date of the deed; they never had any legitimate dren, but before their marriage E had several illegitimate dren who were living at the date of the deed, and who were ıted to be the children of F R. *Held*, that such children took, od, V.-C., relying on the words " already born " : *Gabb* v. *ndergast* (*supra*), p. 464.

Illegitimate children taking by context.

The cases on wills are collected, Theobald, c. 28, I. Illegitimate dren (7th ed.), 284.

Limitation to unbegotten illegitimate child is void.

No limitation to, or trust for, an illegitim child unborn (*quaere* unbegotten) at the date the deed can take effect: Co. Litt. 3 b.

"If a man make a lease for life to B, the remainder to the eld issue male of B, to be begotten of the body of Jane S., whether same issue be legitimate or illegitimate. B hath issue a bast on the body of Jane S.; this sonne or issue shall not take remainder; for (as it hath been said) by the name of issue, if th had beene no other words, he could not take; and (as it hath b also said) a bastard cannot take but after he hath gained a na by reputation that he is the sonne of B, etc. And therefore he take no remainder limited before he be borne, but after he be bor and that he hath gained by time a reputation to be knowne by name of a son, then a remainder limited to him by the name of son of his reputed father is good": Co. Litt. 3 b.

Lord Coke quotes in support of his opinion a case of *Blodwel Edwards* (1596), Cro. Eliz. 509; Noy, 35; Moore, 430; 2 Roll. A 43—44. As to this case Hargrave says: "The several reports the case cited by Lord Coke in the margin differ very mu According to Noy and Moore it was held by all but Popham t the remainder was good, though the bastard was not born till a creating it; and Rolle represents the case as if the opinion had b for the remainder. But Croke agrees with Lord Coke, and wr that a majority of the Judges held the remainder void, tho indeed it appears by his report that the party at length claim as *lawful* issue, it became unnecessary to decide what would be effect of a remainder to an unborn bastard."

In *Re Shaw*, [1894] 2 Ch. 573; (63 L. J. Ch. 770), North, says, at p. 575: "It is conceded that, according to law, the rest *i.e.*, illegitimate children unbegotten at the date of the deed—" take nothing, for the provision made was for illegitimate childr and they were not then even begotten." See opposite page.

It will be noticed that Lord Coke says that an illegitimate ch in order to take, must be *born*, but a limitation to an illegitim child *en ventre* would be good if such child were described as child of the mother, though it would probably be bad if the c were described as the child of the father, owing to the difficult an unborn child having a reputation of paternity. Prior to 1 the only modern case on the subject was *Re Shaw*, [1894] 2 Ch. (overruled, see *infra*), in which case a man went through ceremony of marriage with his aunt, and subsequently settled fu subject to life interests of himself and his reputed wife, for the i of the marriage of himself and his wife as she should appoint, in default of appointment "for the child or children of the

ife' by the said W S, her husband," and North, J., held that a ld born within one month of the date of the settlement did not e the funds, though he said (p. 576) "no doubt there was a ld then begotten in favour of whom a settlement might have been de if proper and apt words had been used; if the settlement had erred to a child already begotten and not born, for example, that ght have been sufficient."

Under and by virtue of her mother's post-nuptial marriage tlement a daughter E became entitled to receive the income of third part of the funds settled for her life for her separate use ependently of and free from the control of one J K, described in said settlement as her husband. Upon the death of the ighter there was a trust for such of her children as should attain nty-one (if sons), or should attain that age or marry (if ighters), in equal shares.

E had gone through a ceremony of marriage a year before the e of the settlement with the said J K, who in fact had been a band of E's deceased sister. At the date of the settlement E *enceinte* with child. About a month after the date of the lement this child was born, and subsequently attained twenty- . E died without ever having been lawfully married. *Held*, t the child was entitled to participate under the settlement: *bern* v. *Fowler*, [1909] 1 Ch. 578; 78 L. J. Ch. 497, overruling *Shaw* (*supra*).

The word issue *prima facie* means descendants; but the context may show that it means children. Issue means descendants.

"It is clearly settled that the word 'issue,' unconfined by indication of intention, includes all descendants. Intention equired for the purpose of limiting the sense of that word, raining it to children only": *per* Grant, M.R., *Leigh* v. *bury* (1807), 13 Ves. 340, at p. 344; and see *per* James, L.J., *ph* v. *Carrick* (1879), 11 Ch. D. 873, at p. 883; 48 L. J. Ch. 801; *per* Jessel, M.R., *Morgan* v. *Thomas* (1882), 9 Q. B. D. 643, at 46; 51 L. J. Q. B. 556; *Re Swain*, [1918] 1 Ch. 399; 87 L. J. 305; compromised on appeal, [1918] 1 Ch. 574; and see also *Timson*, [1916] 2 Ch. 362; 85 L. J. Ch. 561 (all cases on wills).

'The law I take to be that 'issue' *prima facie* means all endants; but the word may, by the context, . . . get the ning of 'children' and be so limited. The onus of proving the word is used in that restricted sense lies upon those who t that construction": *per* Sullivan, M.R. (Ir.), *Re Denis' ts*, Ir. Rep. 10 Eq. 86.

Examples.

Voluntary settlement of real estate on the settlor for life, inder to his nephew John for life; remainder to his sons

successively in tail male; remainder to four persons (three of wh were the testator's sisters, and the fourth was his niece), and tl heirs, on trust that they or the survivor, or heir of such surviv should sell the premises; and that the money raised thereby mi be equally divided between the four persons, or the respect issues of their bodies, in case they, or any of them, should be d at the time of such failure of issue male of John, share and sh alike, *viz.*, to each of them, or their respective children, one fou part thereof; provided that if any of them should be dead with issue, when there should be such a failure of issue of John, ther be equally divided among the survivors or their respective childr in case any of them also should be dead, leaving issue of tl bodies. John died without issue. At the time of his death non the four persons named in the will was living. The niece had d without issue. Of one of the sisters there were children living another, children and great-grandchildren; of the third, only gra children. The contention was that the use of the word "childre restricted the meaning of the word "issue." But Lord Hardwi came to the conclusion that, having regard to the fact that testator must have contemplated that the ultimate trust might t effect after a long lapse of years, when it was more probable t grandchildren and great-grandchildren would be living than childr the word "issue" must be construed strictly as including grandchildren and great-grandchildren: *Wyth* v. *Blackman* (17 1 Ves. Sen. 196; *S. C. sub nom. Wythe* v. *Thurlston*, Amb. 5 See the observations on this case in *Davenport* v. *Hanbury* (17 3 Ves. 257; 3 R. R. 91.

Bond given on marriage for payment to the husband withi limited time after the obligor's death, "if any of the issue of marriage should be living at that time." The children of marriage all died before the obligor, leaving grandchildren were living at the time appointed for payment. *Held*, that grandchildren were "issue" within the meaning of the bo *Haydon* v. *Wilshere* (1789), 3 T. R. 372.

Settlement, on marriage, of personalty on husband for remainder (subject to payment of an annuity to the wife) to s persons as the husband should by deed or will appoint: in defa for his issue. He had no children by the marriage, but he children and grandchildren by a former marriage. *Held*, that children by that marriage, and the grandchildren living at death were entitled equally *per capita*: *Leigh* v. *Norbury* (18 13 Ves. 340.

J, by a voluntary settlement, "in order to make some provi for his daughter, M, the wife of T, and for her issue by T," property on trust for M for life, "and upon the decease of

ving issue by T, upon trust for such issue respectively"; M had ue by T, one daughter only, who died in M's lifetime leaving ldren. *Held*, that such children were entitled as "issue"; *uth* v. *Searle* (1856), 4 W. R. 470.

Where there was a power of appointment between the brothers d sisters "who shall be then living, and the issue of any one or re of them as shall be then dead, leaving issue," with a gift in ault of appointment to the same persons "equally to be divided ong them as tenants in common, the issue of any deceased other or sister to take only such share as such brother or sister uld have taken in case he or she was then living, and the children each deceased brother and sister, if more than one, to take in ual shares as tenants in common between themselves." *Held*, t "issue" was not confined to children: *Harrison* v. *Symons* 66), 14 W. R. 959.

Post-nuptial settlement of personalty, made in pursuance of te-nuptial agreement, on trust (subject to life interests to sband and wife), for "the issue of the marriage" as the wife uld appoint; in default, as the husband should appoint; in ault, for "the child or children of the marriage equally among m, and the issue of any of them who may have died leaving ful issue, the whole issue of any one so dying receiving the re that would have belonged to their deceased parent." *Held*, t "issue" was to be taken in its proper sense: *Donoghue* v. *ooke* (1875), Ir. R. 9 Eq. 489. See also *Re Howard's Trusts* 58), 7 Ir. Ch. R. 344.

Issue restricted to children by reference to parent.

A reference to the "parent" of issue will generally suffice to show that "issue" means "children."

"I have always considered it as settled that in a will or in a d, if it is a question whether the word *issue* shall be taken erally or in a restricted sense, a direction that the issue shall e only the share which their parents would have taken, if living, st be taken to show that the word *issue* was used in its restricted se": *per* Shadwell, V.-C., *Pruen* v. *Osborne* (1840), 11 Sim. , at p. 138; 54 R. R. 338.

By deed trusts of a fund were declared for the children of a rriage living at the death of the husband and wife, with a vision that if any should die in the lifetime of the husband and e leaving issue, such issue should take such share as their ent would have been entitled to, in case he or she had survived husband and wife. *Held*, that a grandchild of a child of the rriage was excluded: *Harrington* v. *Lawrence* (1814), cited

Pruen v. *Osborne* (*supra*), at p. 138. To the same effect
Tatham v. *Vernon* (1861), 29 Beav. 604; 131 R. R. 727;
Barraclough v. *Shillito* (1884), 32 W. R. 875; 53 L. J. Ch. 841

Trust in remainder for twelve named persons, described as
children of A, or such of them as should be alive at a certain tir
" and the issue of such of them as might be then dead leaving iss
to be equally divided between them, share and share alike, but
as the issue of any deceased child should take between them
more than the parent would have taken if then living." *Held*, t
" issue " meant children : *Anderson* v. *St. Vincent* (1856), 4 W.
304; 2 Jur. (N.S.) 607.

When issue restricted otherwise than by reference to parent.

It is difficult to lay down any rule as to what, other tha
reference to parent, will cut down the meaning of " issue "
" children "; although slight indications of intention in marri
articles or a will suffice to show that " issue " is to be constr
" children," this is not the case in a marriage settlement.

" The Court has often laid it down that marriage articles are
be treated only as a memorandum of instructions, which are to
carried out in such a way as to effect the intention of the part
But the Court never deals in that way with an executed settleme
it always takes such an instrument as it finds it. With regard
wills the Court always looks at the intention of the testator,
adopts in practice, if not in theory, a much more benignant rul
construction " : *per* Pearson, J., *Re Warren's Trusts* (1884),
Ch. D. 208, at p. 217; 53 L. J. Ch. 787; and he accordingly h
that a power of appointment in a marriage settlement for the ben
of issue was not restricted to children, notwithstanding that
trust in default of appointment, though referring to issue,
probably confined to children of the context.

But Christian, L.J., in *Re Dixon's Trusts* (1869), Ir. R. 4 Eq
at p. 12, says, " When a testator by his will makes a gift o
limitation to the issue of another, there is nothing in the nature
the occasion of itself to suggest any restriction upon the
sumptively indefinite signification of the word issue. But
reverse is the case when the instrument is a marriage settlem
(which the recitals in this deed show that, though executed a
marriage, it was in effect); for there the occasion itself, the
business in hand, suggests that ' issue ' is used as a synonym
children. Why? Because the proper objects of a marriage set
ment are the children of the intended marriage. Grandchildre
great-grandchildren are never thought of on such occasions,
objects of independent provision; portions are provided for
children, and they are thereby enabled, when their own turn co
to be married, to make provision for their children. But issue m
remote than children are rarely, if ever, directly within the scop

marriage treaty; and therefore it is that, in dealing with such an trument, the very occasion suggests that if 'issue' be the word ed, it is meant in the sense, to which it so easily lends itself, of hildren.' Thus the very nature of the instrument helps to con-ue the word. Another clue is this—the constant association with sue' of the words 'of the marriage' or 'of him.' Thus, in the itals, it is 'to make a provision for the said Anne, and the esent and future issue of the said Anne, by him, the said Thomas illiam,' and again, 'in order to make a provision for the said ne, and the issue of the said marriage'—and in the limitations emselves, the same form of expression is twice repeated, 'to and ongst the present and future issue of the said marriage.' Now, at is the force of those associated words? Plainly, to my mind, particularise the sense of the word 'issue' to that of the mediate offspring of that particular marriage—the issue of the ion of these two individuals, and not the issue of any other ion; in other words, the children of these two." These remarks re approved in Ireland by Sullivan, M.R., in *Donoghue* v. *ooke* (1875), Ir. R. 9 Eq. 489, at p. 497, and in *Re Denis' usts* (1875), Ir. R. 10 Eq. 81, at p. 89, and by Chatterton, V.-C., *Harris* v. *Loftus*, [1899] 1 Ir. R. 491, at p. 500: but were approved by Porter, M.R., in *Hobbs* v. *Tuthill*, [1895] 1 Ir. R. 5, at p. 127.

Examples.

Lease for lives to A, her executors, etc. A assigns for value to e use of B for life, and afterwards to the use of his issue lawfully gotten, and for want of such issue over. *Held*, that issue meant ildren: *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681.

Context.

By a marriage settlement a fund was settled (after the death of e survivor of the husband and wife) in trust for "the children en living," to be paid at twenty-one; and in case both the sband and wife should die "without leaving any lawful issue," en as the husband should appoint, and in default of appointment, n case there should be no child or children as aforesaid," over. e children of the marriage all died in the lifetime of the husband d wife, leaving children who survived their grandparents. *Held*, at the gift over took effect: *Re Heath's Settlement* (1856), 23 av. 193; 113 R. R. 93.

A settlement of personalty contained trusts for the children as ants in common, "the share or shares of such of the said ildren as shall be a son or sons to be considered as a vested and nsmissible interest at his or their respective age or ages of enty-one years, or dying under that age leaving lawful *issue* of or their body or bodies lawfully begotten, living at his or their ath or respective deaths, and of such of them as shall be a ughter or daughters at her or their like age or ages, or day

or days of marriage, respectively, which shall first happen
and a covenant for the settlement of the after-acquired property
the wife upon trust for her for life, and afterwards "for all a
every *the issue* of the marriage upon the same trusts," with a g
over in case no *child* or *children* should attain vested interests, e
Held, that the word "issue" in the covenant meant childre
Marshall v. *Baker* (1862), 31 Beav. 608; 135 R. R. 568.

Where a marriage settlement recited an intention to provide f
"the issue of the said intended marriage," and the trusts, aft
the deaths of the husband and wife, were for the "issue of the sa
marriage" as the husband should appoint, and in default
appointment, for "such issue" equally; but if there should be
"issue" of said intended marriage, or in case all such "issue
should die under twenty-one or before marrying, then in trust f
the survivor of the husband and wife, it was held that "issue
meant "children": *Re Denis' Trusts* (1875), Ir. R. 10 Eq. 81.

By marriage settlement, a fund was settled in trust, after t
deaths of the husband and wife, for the issue as the husband shou
appoint, and if there should be only one child living at the death
the survivor of the husband and wife, then in trust for such o
child, with a gift over, if there should be no issue of the marria
living at the death of the husband. *Held*, that "issue" mea
"children": *Re Meade's Trusts* (1881), 7 L. R. Ir. 51.

"Male issue lawfully begotten."

Limitation in a voluntary settlement to the use of A for li
remainder to the use of "the first male issue lawfully begotten
A which should attain the age of twenty-one years, and to the he
and assigns of such male issue for ever." *Held*, that "male issue
meant sons (stress was laid on the words "begotten by A," a
there were other expressions which helped this construction
Hampson v. *Brandwood* (1816), 1 Madd. 381, see p. 388.

"Issue male."

In a limitation to A for life, remainder, after his decease, to
"issue male, and for want of such issue," to A in fee, the wo
"issue male" were construed "sons": *Fitzherbert* v. *Heathc*
(1771), cited in *Bayley* v. *Morris* (1799), 4 Ves. 788, at p. 794.

"Issues females."

Limitation in remainder to "issues females," of their bodi
Held, that daughters were meant: *Earl of Sussex* v. *Temple* (169
1 Ld. Raym. 310.

Issue restricted to children in one clause only.

Though "issue" may in one clause of a settlement me
"children," it does not necessarily follow that it is used in the sa
meaning in every clause: *Re Biron's Contract* (1878), 1 L. R.
258; *Re Warren's Trusts* (1884), 26 Ch. D. 208; but "I do
know whether it is law or a canon of construction, but it is go
sense to say that whenever in a deed or will or other document y
find that a word used in one part of it has some clear and defin
meaning, then the presumption is that it is intended to mean

me thing where when used in another part of the document its eaning is not clear" : *per* Lindley, M.R., *Re Birks*, [1900] 1 Ch. 7, at p. 418; 69 L. J. Ch. 124 (a case on a will).

"The contention of the appellant and the judgments of the o Judges who decided in his favour are based upon a supposed le of construction that the same meaning ought to be given to expression in every part of the document in which it appears. . The truth is there is no rule of such general application is contended for by the appellant. A difficulty or ambiguity ay be solved by resorting to such a device, but it is only in ch cases that it is necessary or permissible so to do" : *per* rd Warrington, *Watson* v. *Haggitt*, [1928] A. C. 127, at 130, 1.

"Child," "children," and "issue" are always words of purchase.

Children and issue always words of purchase.

If a man give lands or tenements to a man *et semini suo*, or *itibus vel prolibus de corpore suo*, to a man and to his seed, or to e issues or children of his body, he hath but an estate for life; r albeit that the statute provideth that *voluntas donatoris cundum formam in charta doni sui manifeste expressam de caetero servetur*, yet that will and intent must agree with the rules of w, and of this opinion was our author himself, as it appeared his learned reading on this statute, where he holdeth, if a man veth land to a man *et exitibus de corpore suo legitime procreandis semini suo* he hath but an estate for life for that there wanteth rds of inheritance : Co. Litt. 20 b.

"First issue male" are words of purchase : *Lewis Bowles' Case* 615), 11 Rep. 79 b.

"The word 'issue' in a will may be a word of limitation, but in deed is always a word of purchase" : *per* Hardwicke, C., *gshawe* v. *Spencer* (1748), 2 Atk. 570, at p. 582; *per* Kenyon, J., *Doe* v. *Collis* (1791), 4 T. R. 294, at p. 299; 2 R. R. 388.

"Issue male . . . would necessarily take as purchasers" : r Sugden, L.C., *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1, p. 17; 59 R. R. 617.

The reason for the rule is stated as follows in 2 Fearne, C. R. 9, s. 509 :—

"In a deed no word except the word 'heirs' will pass an estate inheritance, and hence the word 'issue' cannot there be a word limitation. It is therefore a word of purchase in this case, cause that is the only construction by which it can become erative, not because it is aptly a word of purchase."

Examples.

Lease for three lives to A, her executors, etc. A assigned to the

use of B for life, and afterwards of his issue lawfully begotten, ar for want of such issue, over; B died leaving a son and a daughte *Held*, that they took the estate *pur autre vie* absolutely as joi tenants: *Williams* v. *Jekyl* (1755), 2 Ves. Sen. 681.

Limitation to "issue" gives life estates only in realty.

It follows that a limitation of real estate to "issue" gives li estates only: *Fitzherbert* v. *Heathcote* (1771), cited in *Bayley* *Morris* (1799), 4 Ves. 788, at p. 794; *Rochfort* v. *Fitzmauri* (*supra*), at p. 17; *Barron* v. *Barron* (1858), 8 Ir. Ch. R. 366.

"A. and his issue."

A limitation of realty to "A and his issue," there being issue alive at the date of the deed, gives a life estate to A, and t issue take nothing, even if the limitation is in remainder, and iss are born before it takes effect in possession: *Makepiece* v. *Fletch* (1721), 2 Com. Rep. 457; *Wheeler* v. *Duke* (1832), 1 Cr. & Me 210; *Dawson* v. *Dawson* (1850), 13 Ir. L. R. 472.

Personalty.

There does not seem to be a case of an immediate gift by de of personalty to "A and his issue," but it is probable that if the were no issue in existence, A would take, and if there were issue existence, A and the issue then living would take jointly. T issue would take *per capita*, *Leigh* v. *Norbury* (1807), 13 Ves. 34 and jointly, *Davenport* v. *Hanbury* (1796), 3 Ves. 257; 3 R. R. 9

Marriage articles.

As to the construction of "issue" in marriage articles, see *inf* Chapter on Executory Trusts.

As to words of limitation and the new law, see Chapter XV

CHAPTER XXV.

ELDEST SON—YOUNGER CHILDREN.

dest Son: Younger Children: Where Provision made for both, Eldest means succeeding to Provision for Eldest: Parents and Persons in loco parentis: Children of Second Marriage: Time at which Characters Ascertained: Eldest Son not taking Estate included: Eldest Son only Tenant for Life: Eldest Son who Disentails: Younger Child taking Estate excluded: Eldest Daughter taking Estate: Younger Child taking Estate, but not under Settlement, not excluded: If Provisions are made for Children Nominatim Rule does not apply: Interests indefeasibly Vested are not Divested: Where No Provision made for Eldest Child Younger Children has natural meaning: What Evidence sufficient to connect different Deeds so as to make Rule apply: Portions exceeding Value of Estate: "Besides" distinguished from "Other than."

Meaning of "eldest" and "younger."

THE words "eldest" and "younger" applied to individuals erely as living beings, without reference to property, office, title, other like distinctions, must, of course, be taken to refer to the der of birth. Thus in the limitations of an estate, the expression eldest son" (*Bathurst* v. *Errington* (1877), 2 App. Cas. 698; 46 J. Ch. 748; *Meredith* v. *Treffry* (1879), 12 Ch. D. 170; 48 L. J. . 337, both cases on wills), or "eldest child," or "*senior puer*" *ane* v. *Cowper* (1575), Moore, 103; *S. C. sub nom. Lane* v. *Coups*, v. 64; *sub nom. Humfreston's Case*, Dy. 337 a; 2 Leon. 216, ere a daughter was older than a son) means a first-born son or ild. But the persons to whom the words are applied may be aced in situations or under conditions in which the words would sensible if they applied to position; the question then arises ether, from the context in which the words are used, they are to referred to the difference in the age, or to that in the position, the parties to whom they are applied. There are many familiar tances in which the words are applied to persons with relation to eir office or situation; as where one member of the bar is said be "senior" or "junior," a junior peer, a puisne Judge, and e like.

"Eldest son."

The cases show that on the one hand where provisions for unger children are made by an instrument which makes pro-

vision, or refers to or is shown by extrinsic evidence to be connecte with provision made by the same settlor, for the "eldest child," tl word "eldest" is used to designate the child who becomes entitle to the provision made for the eldest, even though he may n be the eldest in order of birth, and "younger" means other tha such "eldest"; but that, on the other hand, where provisions a made for "younger children," by an instrument that does n make provision, or does not refer to or is not shown by extrins evidence to be connected with provision made by the same settlo for the "eldest" child, the word "younger" is used in its liter meaning, *i.e.*, in reference to order of birth.

Where provisions are made by same settlor for eldest child and younger children, eldest means succeeding to provision for eldest.

> In provisions made for younger children, by deed which limits an estate to, or refers to or shown by extrinsic evidence to be connected wit an instrument made by the same settlor limiting a estate to, the eldest child, the phrase "elde child" means "child succeeding to the estate" and "younger children" means "children n succeeding to the estate."

Rule applies to parents and persons *in loco parentis.*

In many of the cases this proposition is confined to deeds ma by parents, or persons *in loco parentis*, with regard to whom it h been said, "Now what is the meaning of a person *in loco parenti* I cannot do better than refer to the definition of it given by Lo Eldon in *Ex p. Pye* (1811), 18 Ves. 140; 11 R. R. 173, referr to and approved of by Lord Cottenham in *Powys* v. *Mansfie* (1837), 3 My. & Cr. 359, at p. 367; 7 L. J. Ch. 9; 45 R. R. 27 Lord Eldon says it is a person, 'meaning to put himself *in lo parentis*; in the situation of the person described as the lawful fath of the child.' Upon that Lord Cottenham observes, 'but tl definition must, I conceive, be considered as applicable to tho parental offices and duties to which the subject in question h reference, namely, to the office and duty of the parent to ma provision for the child. The offices and duties of a parent a infinitely various, some having no connection whatever with maki a provision for a child; and it would be most illogical, from t mere exercise of any such offices or duties by one not the father, infer an intention of such person to assume also the duty providing for the child.' So that a person *in loco parentis* mean person taking upon himself the duty of a father of a child to ma a provision for that child": *per* Jessel, M.R., *Bennet* v. *Ben* (1879), 10 Ch. D. 474, at p. 477.

Therefore is of universal application.

It appears to follow that whenever a person other than parent makes a settlement of an estate on an "eldest" child, a

arges portions on it or otherwise makes a provision for the younger" children, he has placed himself *in loco parentis* within e meaning of the rule, and hence that in every case where there e provisions made by the settlor for the eldest child and the unger children, the proposition must be applicable, since the ovisions must be either made by a parent, or, if made by a person ner than a parent, the mere fact of their being made in that form of itself conclusive evidence that such person was *in loco parentis*; oreover, in referring to the limitation of the doctrine to cases nere the provision is made by a parent or person *in loco parentis*, rd St. Leonards, Sugd. Pow. (8th ed.), 680, says, "This disction does not appear to be attended to at the present day." e proposition, therefore, is here stated as of universal applicaity and not as confined to provisions made by parents and persons *loco parentis*.

It is true that in *Sandeman* v. *Mackenzie* (1861), 30 L. J. Ch. 8; 128 R. R. 533; 1 J. & H. 613, Wood, V.-C., at p. 628, expresses me doubt whether the proposition is of universal applicability, but the case before him it was not necessary to do so, as the eldest son s not provided for by, or by any instrument referred to by or nnected with, the settlement which he had to construe.

"Younger children" includes children by subsequent marriages.

The expression "younger children" includes children by a subquent marriage: *Brathwaite* v. *Brathwaite* (1685), 1 Vern. 334; *utcher* v. *Butcher* (1812), 1 V. & B. 79, at p. 91; 12 R. R. 193; *reen* v. *Green* (1845), 2 Jo. & Lat. 529, at p. 541; 8 Ir. Eq. R. 3; 69 R. R. 364.

Time at which eldest child is ascertained.

The time at which the characters of eldest child and younger ildren are to be ascertained is the time at which the fund is to be stributed among the younger children, which may or may not be hough it generally is) the time at which the eldest succeeds to the tate.

"Every child except the heir is considered in equity as a unger; and eldership not carrying the estate along with it is nsidered not such an eldership as shall exclude by virtue of such auses; and it would be hard that the right of eldership should be ken away, and yet not have the benefit of it as a younger child": r Lord Hardwicke, C., *Duke* v. *Doidge* (1746), 2 Ves. Sen. 203, te, cited by Wood, V.-C., in *Macoubrey* v. *Jones* (1856), 2 K. & J. 4, at p. 691; 110 R. R. 415.

"It is now well-established law that where the bulk of an estate settled in strict settlement, and by the same settlement portions e provided for younger children, no child taking the bulk of the tate by virtue of the limitations in strict settlement shall take y benefit from the portions. And that is so, whether the settlent does or does not contain an express provision to exclude him

from a share in such portions" : *per* Wood, V.-C., *Macoubrey* v. *Jones* (*supra*), at p. 690; cited with approval by Lord Cairns in *Collingwood* v. *Stanhope* (1869), L. R. 4 H. L. 43, at p. 61; 38 L. J. Ch. 421.

"The principle of the cases relating to settlements is this, that the Court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement) is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded. These seem to me to be the two beacons, or landmarks, by which the Court has directed itself in steering, sometimes, undoubtedly, a very difficult and doubtful course. That principle has led to this conclusion, that although it should be, in terms, said in the settlement that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child, the first born, does not take the family estate, it has been held that, the family estate going to a younger son (which I also ought, indeed, to have mentioned as a leading part of that same system of exposition), the Court of Chancery does not regard the elder born as the elder son, but regards the younger brother, who is in possession of the family estate, as the elder, and the actually elder brother as the younger, in order to introduce him as a younger brother into the benefits of the portions provided for the younger children. That being so, it has been farther held that the Court will not, notwithstanding very strong words (as there have been in some cases) in the settlement to the contrary, hold the portions to be indefeasibly vested in the children in such a manner as to allow, on the one hand, a double portion to be given to one child, or, on the other hand, to allow any child to be excluded. And therefore it has come to this conclusion, that the period for ascertaining what is the true construction of the settlement with reference to the distribution, or the portions provided for the children, is that period when the distribution itself is to take place. Then, looking round, and seeing all the events which have happened in the family, though you may find that one child has held the place of a younger child during the period that the settlement has been in existence, that is to say, subsequent to the marriage of the parents, and holding in such case that the younger child has become entitled to a portion, nay, even though that portion may have been assigned to him, yet if, at the period of distribution, that child has become the elder child, then he is no longer entitled to a portion, and the portion which has been assigned to him is no longer his; he takes the family estate, and the rest of the children

Eldest child not succeeding to estate takes a portion.

Period of distribution.

e let in as younger children to the benefit of the fund out of ich the portions are to be provided, including that portion of the ıd which had been assigned to him who has now become the er child" : *per* Lord Hatherley, C., *Collingwood* v. *Stanhope*, *ɔra*, at p. 52.

Time at which character fixed.

"This case depends upon the inquiry at what time the words of ɔlusion of the eldest son for the time being come into operation; ıt is to say, at what time the eldest son for the time being is to looked for and ascertained. . . . The persons entitled must be ertained at the time when the money is directed to be raised and ided, and the words of exception appear to me to attach at that ıe upon the son who then answers the description, and to exclude n from the class of persons interested" : *per* Lord Westbury, C., *ison* v. *Thomas* (1862), 1 De G. J. & S. 18, at p. 25; 32 L. J. Ch. ; 137 R. R. 132. Similar observations will be found, *per* Maule, in *Scarisbrick* v. *Skelmersdale* (1840), 4 Y. & C. Ex. 78, at 113; 73 R. R. 20; *Tennison* v. *Moore* (1850), 13 Ir. Eq. R. L.

"The period at which the rights of the parties are to be ascerned has been well and conclusively settled to be that at which fund becomes distributable under the trusts" : *per* Bacon, -C., *Carter* v. *Earl of Ducie* (1871), 41 L. J. Ch. 153, at p. 157; W. R. 228, at p. 230.

Eldest son not taking estate entitled to share in portions.

In the following cases an eldest child not succeeding to the ate was held entitled to a share under provisions for younger ldren.

Land was settled on A for life, remainder to his first and other ıs successively in tail male, remainder to B in tail male, nainder to A in fee, with power to A to charge portions for unger children, sons and daughters, who should be living at his ıth. A exercised the power in favour of his daughters and died, ving had two daughters but no son. *Held*, that both daughters re entitled to portions. Harcourt, L.C., said, "Every one but heir is a younger child in equity, and the provision which such ıghter will have is but as a younger child's, in regard the son es away with the land as heir; so here, the estate by the settlent goes all to the remainderman, who is *haeres factus*, and neither the two daughters is heir, wherefore the elder daughter, having more than the younger, is (as to this provision) a younger child, d consequently capable of taking it" : *Beale* v. *Beale* (1713), 1 Wms. 244.

Eldest son tenant for life only.

In *Ellison* v. *Thomas* (1862), 2 Dr. & Sm. 111, the eldest son was y tenant for life, with remainder to his first and other sons in ; but Lord Westbury, C. (reversing the decision of Kinders-, V.-C.), held that the rule must be applied in his favour, so that,

on his death without issue male, before the time of distribution, h executors were admitted to share in the provisions for young children. Some importance was attached to the words describi the class of children intended to be provided for, *viz.*, " childr . . . other than and besides an eldest or only son for the time bei entitled under or by virtue of a certain indenture of settleme bearing even date herewith to " certain estates. See also *I Cavendish* (1912), 56 Sol. J. 344, which is not materially distinguis able from *Ellison* v. *Thomas*. *Gray* v. *Earl Limerick* (1848 2 De G. & Sm. 370; 17 L. J. Ch. 444; 79 R. R. 249, is *contra*, b cannot be relied on.

An estate was settled on a father for life, remainder to childr as he should appoint, remainder to a trustee for a term for raisi portions for younger children, remainder to the father's first a other sons successively in tail; the eldest son attained twenty-o and died without issue in the father's lifetime, and then the fath appointed the estate to the younger son. *Held*, that the person representatives of the eldest were entitled to a share under t provisions for younger children: *Davies* v. *Huguenin* (1863), H. & M. 730; 32 L. J. Ch. 417; 136 R. R. 319.

Daughter.

Where the limitations of the estate extended to daughters, and daughter (the only child, except a son who died in infancy) w married and died in the lifetime of the tenant for life, the M.R. Ireland held that she was entitled to a portion as being " a chi other than an eldest or only son," though she was an only child her death, on the ground that her remainder was liable to divested by the birth of a son: *Simpson* v. *Frew* (1855), Ir. Ch. R. 428; but the decision was reversed on another poin (1856), 5 Ir. Ch. R. 517. And see *Stirum* v. *Richards* (1861), Ir. Ch. R. 323, *infra*, p. 483.

Eldest son who has disentailed.

It need hardly be said that the doctrine under consideration w not be applied so as to give a share in the provisions for t younger children to an eldest son, who at the time of distributi would have been entitled under the settlement to the estate, b who has barred the entail: *Collingwood* v. *Stanhope* (1869), L. R. H. L. 43; *Re Fitzgerald's Settled Estates*, [1891] 3 Ch. 39 60 L. J. Ch. 624.

Collingwood v. *Stanhope* (*supra*) was explained in *Shuttlewor* v. *Murray*, [1901] 1 Ch. 819; 70 L. J. Ch. 453, where there is *dictum* by Rigby, J., to the effect that the rule of constructi adopted in the case of provisions for children made by a pare or a person *in loco parentis* must not be applied in interpreting shifting clause or an exception in the nature of a shifting clau in limitations of real estate. Such clauses should be constru strictly. *Shuttleworth* v. *Murray* was a case on a will and w

rmed on appeal, *sub nom. Law Union and Crown Insurance* v. *Hill*, [1902] A. C. 263; 71 L. J. Ch. 602.

"In *Fazakerly* v. *Ford*" ((1831), 4 Sim. 390; 33 R. R. 129), s explained (and I venture to think accurately) by Lord herley in the House of Lords, it was sought to displace a vested in favour of one person and to substitute another use for it, Lord Hatherley said that in such a case you must follow the ct meaning of the words; you must give them their primary natural meaning, and if you find that they do lead to the stitution of one use for another, you must give effect to them; , on the other hand, unless they naturally lead to that result, y have no operation at all. In the present case there is not, ctly speaking, a substitution of one use for another, but there hat which I conceive is in substance exactly the same. . . . s is not the case of a parent or a person *in loco parentis* who naking a provision that an elder son shall have an estate, and t the younger sons or children shall have portions charged on estate. There is nothing of the kind, or approaching it. There indeed an attempt to argue, and I think Cozens-Hardy, J., inclined to the view, that there is here a gift to a class, olving a period of distribution. That argument, as it seems me, is absolutely unfounded. There is not a gift to a class. ere is a succession of gifts to individuals taken out of the class sons. No distribution is to take place, and therefore there is period of distribution": *per* Rigby, J., [1901] 1 Ch. 819, at 826.

Younger child taking estate excluded from portions.

In the following cases a younger child succeeding to the estate s held not entitled to share in provisions for younger children.

A father on his marriage settled an estate on himself for life, h remainder to trustees after his death on trust to raise portions his younger children, in such proportions as he should appoint, l in default equally, to be paid at their respective ages of twenty- years, with remainder to his first and other sons successively in . The father appointed a sum to his second son, who was of age at the time, and afterwards on the death of the eldest son hout issue, and without having barred his estate tail, appointed whole of the portions fund among the other younger children. *ld*, that the second son took nothing under the first appointment. t the time of the appointment he was a person capable to take, l was a younger child within the power of appointing: but this a defeasible appointment, not from any power of revoking, or n the words of the appointment, but from the capacity of the son. He was a person capable to take at the time of the appoint- nt made, but that was *sub modo*, and upon a tacit or implied dition that he should not afterwards happen to become the

eldest son and heir " : *per* Wright, L.K., *Chadwick* v. *Dolem* (1705), 2 Vern. 528.

A testator after settling real estate upon his daughter for l with remainder to her first and other sons successively in tail ma with remainders over, further empowered her by deed on h marriage to charge £6,000 on the estates so settled as portions f her younger children to be payable " at such times or time and such manner " as she should by deed appoint.

On the marriage of the daughter a term of years was (*inter al* limited to trustees upon trust to raise the portions after the death the daughter and her husband, such portions to be vested in a payable to sons at twenty-one and daughters at twenty-one marriage. Payment, however, was to be postponed until after t death of the daughter and her husband, unless the husband shoul in writing, signify that such should be paid earlier. The daught died leaving three children (two sons and a daughter), all of who attained twenty-one before her death. Subsequently the husba joined in a mortgage by the younger son of his portion (£3,000), signify that the same should be raised immediately. The eld brother died without issue and the younger son succeeded to t estates as tenant in tail and died without issue. *Held*, on appe reversing Neville, J., that upon the construction of the testato will and the marriage settlement and in the events which h happened, the daughter's power of appointment among young children had not been exercised in favour of the original " young son " and that his estate was not entitled to the £3,000 : *Stawell's Trusts*, [1909] 2 Ch. 239; 78 L. J. Ch. 677, reversi [1909] 1 Ch. 534; 78 L. J. Ch. 289.

The branch of the rule by which a younger child becoming t eldest is excluded from the provision for younger children, was al applied in *Broadmead* v. *Wood* (1780), 1 Bro. C. C. 77 (where appointment had been made *nominatim* to a younger child, w afterwards became the eldest, and where the power express excluded " the eldest son, or the son possessing the estate " *Teynham* v. *Webb* (1750), 2 Ves. Sen. 198 (where it does not appe from the report that any estate was settled on the eldest son, b the provisions for the younger children were, in the circumstanc construed with reference to provisions for the eldest son); *Gray* *Earl Limerick* (1848), 2 De G. & S. 370; *Ellison* v. *Thomas* (186 2 Dr. & Sm. 111; 1 De G. J. & S. 18; *Davies* v. *Huguen* (1863), 1 H. & M. 730; and *Re Bayley's Settlement* (1871), L. 9 Eq. 491; L. R. 6 Ch. 590, in which case the real estate of t husband having been settled (subject to a life interest in t husband), on the first and other sons of the marriage successive in tail male, the provisions for the younger children were made

eparate deed, in which the settlement of the husband's estate s recited, and the real estate of the wife was settled (subject to a interest in her), "to the use of all and every the son and sons her than an eldest or only son), and daughter and daughters of marriage, in equal shares as tenants in common" in tail; and was provided that if any such younger son or daughter should , and there should be a failure of issue of his or her body, or in e any such younger son or sons should become an eldest or only before he or they should attain the age of twenty-one years, n the share of such son or daughter, as well original as accruing, uld go to the survivor or survivors, or others, of the younger s or daughters (if more than one) in equal shares, as tenants in mon in tail, and if there should be only one such son or ghter, to him or her in tail; and it was held, that a younger who, after attaining twenty-one, became in the lifetime of his ther an eldest son, was not entitled to a share of the wife's estate, e at the time of distribution he had ceased to be a member of class "younger sons."

Rule applied to real estate settled in shares on younger children.

R on his marriage settled real estate on himself for life, ainder to trustees for a term, remainder to the sons of the rriage successively in tail male, remainder to the sons of his ond marriage successively in tail male, remainder to the ghters of the marriage successively in tail male, remainder to in fee. The trusts of the term were to raise £3,000 for the tions of the daughter or daughters and younger son or sons of marriage, if more than one daughter or younger son, the £3,000 be payable among them as R should appoint, or in default ally; but if only one daughter or younger son who should not R's death be his eldest son, then to raise a sum not exceeding 000 for such only daughter or younger son payable as R should oint. R had issue two daughters only. *Held*, that in the sts of the portions term, "daughter" meant daughter not suding to the estate: *Stirum* v. *Richards* (1861), 12 Ir. Ch. R. ; to the same effect is *Northumberland* v. *Egremont* (1759), d. 435.

Rule applied to eldest daughter taking estate.

A younger child, who at the time of distribution is entitled to the estate, not under the original settlement by which, or by reference to which, provisions are made for the eldest child and younger children, but under subsequent dealings with the estate, is entitled to share in the provision for younger children.

Child taking estate, not under settlement, not excluded.

Cases in which this rule has been applied are: *Spencer* v.

Spencer (1836), 8 Sim. 87; 5 L. J. Ch. 310; 42 R. R. 111, wh the eldest son and his father barred the estate tail, and resett the property on the father for life, with remainder to the in fee, and the son died intestate in the father's lifetime, so t the fee descended to the second son, who attained twenty-one, a died in his father's lifetime; *Tennison* v. *Moore* (1850), 13 Eq. R. 424, where the eldest son joined with his father in barr the entail and resettled the estate, and the second son, who become the eldest at his father's death, succeeded his father tenant for life under the resettlement; *Macoubrey* v. *Jones* (185 2 K. & J. 684, where the eldest son and his father barred entail, mortgaged the property, and resettled it in such a man that the second son, who was the eldest at the time of distributi became entitled to a share only of the estate; *Adams* v. *B* (1858), 25 Beav. 648; 119 R. R. 583, where the eldest son bar the entail, and devised the estate to uses, under which the sec son had become entitled as tenant for life at the time of dis bution; *Ex p. Smyth* (1861), 12 Ir. Ch. R. 487, and *Re Fitzgeral Settled Estates*, [1891] 3 Ch. 394. In all these cases, second s or their representatives were held to be entitled to a share in provisions for the younger children, notwithstanding that second sons had become entitled to the estate or some part there *Wakefield* v. *Richardson* (1883), 13 L. R. Ir. 17, is a case wh the point was raised (see p. 32), and seems to have been conced The case of *Peacocke* v. *Pares* (1838), 2 Keen, 689; 6 L. J. 375; 44 R. R. 318 (where the facts were similar to those in *Ada* v. *Beck*, *supra*, and it was held that the younger son who s ceeded to the estate was not entitled to any provision as a youn child), must be considered to be no longer law.

In a settlement of personalty executed contemporaneously w a settlement of realty the trusts declared after the death of survivor of the intended spouses were in favour of the children the marriage "other than an eldest or only son or other son w before attaining the age of twenty-one years shall be or beco the heir male or heir male apparent of" the husband, as spouses should appoint. Neither settlement referred to the oth but each was made in consideration of the marriage. There w five children of the marriage. The eldest attained twenty-one, entailed and resettled the estate and died a bachelor; on his de Victor, the third-born son, became the "eldest son" and too life estate under the resettlement. The husband died in 1910 Victor became entitled to the settled real estate for his life. *H* that the two settlements must be read together, but that Vi was not excluded from a share in the settled personalty: *Wrottesley's Settlement*, [1911] 1 Ch. 708; 80 L. J. Ch. 457.

"Even if I read this clause as one to which the old series of
es with regard to an eldest son only is applicable, I shall be
ind to come to the conclusion that the present lord never became
eldest son within the meaning of the clause, because he did
under the limitations of the settlement take the bulk of the
ate, but only a life interest under a subsidiary settlement. On
other hand, it appears to me that probably the correct view
hat in a clause framed in this way, which contrasts an eldest
with a younger son who becomes entitled under the age of
nty-one to an estate or becomes under the age of twenty-one
heir-at-law of the existing person or the heir-at-law apparent
the existing person," eldest son "can only mean the actual
est son, particularly as from the conveyancing point of view the
ise referring to minority has been expressly introduced in order
prevent a portion which has once vested from being divested": Parker, J., [1911] 1 Ch., at p. 715.

Child taking under exercise of general power.

Where under a power in a marriage settlement, uses are revoked
new uses declared, under which a younger child, who becomes
eldest at the time of distribution, takes, through the mere
inty of his parent, property which, but for such revocation, he
ild have taken as eldest son under the settlement, he does not
reby cease to be entitled to a portion as a younger child: *ndesforde* v. *Carrick* (1871), Ir. R. 5 Eq. 486; see p. 497, where
atterton, V.-C., said, "the plaintiff has become possessed of
Southwell estates as tenant for life, and of course if they were
en by him under the limitations of the settlement of 1812, he
ild have ceased to be entitled to a younger child's portion. But,
my opinion, he has not taken any estate under that settlement in
h a sense as that he should be deemed an eldest son. Anne,
dy O., revoked the uses which constituted that instrument a
lement of the estate, and thus destroyed the settlement. . . .
then proceeds as a matter of bounty to devise the lands as her
n property. . . ." The plaintiff "no longer takes under the
itations of the settlement, or as a child of the marriage. What
has taken cannot be deemed a portion or provision under that
rument, and it is therefore not within the principle on which
Court deals with such cases."

Where provisions made *nominatim*.

Apparently, where provisions are made for the younger children,
he eldest child is excluded, *nominatim*, the rule does not apply.
Provision was made by a father under a private Act of Parlia-
nt for his eldest son John, and power was given to the father to
oint a sum among "Stephen the son, Martha and Catherine the
ghters of Stephen Jermyn the father, and the survivors or
vivor of them, and such other child and children as the said
Jermyn the father should hereafter have." The eldest son died

without issue; then the father appointed in favour of Stephe Held, that he was an object of the power. Lord Talbot, C., sai "Stephen is indeed called a younger child in the preamble; b when the power of appointment is given, it is not to appoi amongst the younger children generally, but to Stephen, Marth and Catherine": *Jermyn* v. *Fellows* (1735), Cas. temp. Talb. 9 Lord St. Leonards, in his comments on this case (Sug. Po (8th ed.) 679), says, "The case seems to establish this princip that where a younger child is included by his *name* in a power, will continue an object of the power, although he lose his charact of younger son" (see *Re Bankes* (1910), 101 L. T. 778). But points out that Lord Talbot distinguished the case from *Chadwi* v. *Doleman* (1705), 2 Vern. 528, on the ground that there t question was between a younger son who had become the elde and the other younger children, while in *Jermyn* v. *Fellows* it w between the only surviving child and the administrators of deceased child, "so that this case," he says, "cannot perhaps relied on as an authority for the general principle which at fi sight it seems to establish." And see *Savage* v. *Carroll* (181 1 Ball & B. 265 (12 R. R. 108), where Lord Manners, C. (at p. 27 distinguished *Jermyn* v. *Fellows*, saying, "As to the fact of t younger children being enumerated by name in that case and t same circumstances occurring here, I do not think any weight is to attached to it; for here the mother was dead and all the childr to take were ascertained."

By a marriage settlement a husband covenanted to pay £10,0 for the children of the marriage, and for want of such children, the children of the wife by a former marriage, other than A h eldest son, as the husband should appoint, and in default, for such children, except as aforesaid, who should attain twenty-o equally, and if only one, except as aforesaid, then in trust for su one younger child; the eldest son attained twenty-one, and died his mother's lifetime; there were no children of the second marria *Held*, that the executors of the second son, who on the death of brother succeeded to the family estates and attained twenty-o and died in his mother's lifetime before the period of distributi were entitled to a share: *Sandeman* v. *Mackenzie* (1861), 1 J. & 613. And see *Wood* v. *Wood* (1867), L. R. 4 Eq. 48; *Prytherch* (1889), 42 Ch. D. 590; 59 L. J. Ch. 79 (both ca on wills).

Interests indefeasibly vested before time of distribution are not divested.

Of course, if it clearly appear from the deed that the interests the younger children are to vest indefeasibly at a time other th that of distribution, an interest once vested will not be diveste *Windham* v. *Graham* (1826), 1 Russ. 331; 25 R. R. 62. See comments on this case in *Re Bayley's Settlement* (1870), L. R.

. 491; L. R. 6 Ch. 590. See also *Re Wise's Settlement*, [1913] Ch. 41; 82 L. J. Ch. 25, where it was pointed out by Eve, J., page 49 of the prior report, that *Re Bayley's Settlement*, *supra*, s not a case of portions proper.

Stock settled upon trust for children (except an eldest son itled to settled estates), in equal shares, shares of sons to be sted at twenty-one, of daughters at twenty-one or marriage. ere were two children, a son, who died an infant, and a daughter o married (before her brother died), and became on her brother's ath entitled to the settled estates. *Held*, that the daughter took absolutely vested interest in the stock: *Carter* v. *Earl Ducie* 871), 41 L. J. Ch. 153; 20 W. R. 228, where Bacon, V.-C., said at the daughter took on her marriage a vested interest in the ole fund, and he referred to the rule that an estate once vested not to be divested but by plain express words. The circumnces and terms of the deed in this case were somewhat peculiar, d if it had been held—as was contended for—that the daughter ing the estates was to be considered as "an eldest or only n," still on the terms of the settlement, an only son would have ken both the estates and the settlement fund.

Where no provision is made for eldest child, younger has natural meaning.

In provisions made for younger children by a deed which does not limit an estate to, or does not refer to, or is not shown to be connected with, an instrument limiting an estate to, the eldest child, the words "eldest" and "younger" have reference to priority of birth.

In these cases the time at which the characters of eldest child and unger children are in general to be ascertained is the time of sting.

Trust in a settlement of stock to pay the income of a fund to M life, and at her death "to pay or transfer the stock to all her ildren, except her eldest or only son, in equal shares, at their pective ages of twenty-one years." A younger son attained enty-one and then became the eldest by the death of his elder other before the time of distribution. *Held*, that his share was t divested: *Re Theed's Settlement Trust* (1857), 3 K. & J. 375; L. J. Ch. 514; 112 R. R. 192; *Sandeman* v. *Mackenzie* (1861), J. & H. 613.

A sum of money was settled on marriage on trust for the sband (a baronet) and wife and the survivor for life, and then to nsfer among all the children equally except an eldest or only n, the shares of sons to vest at twenty-one and the share of any

child who died before the period of vesting to accrue for the bene of the others, except an eldest or only son. There were six son the first and last born died infants; the second attained twenty-o and succeeded his father in the title but died without issue befo the period of distribution; the third and fourth sons attained twent one and died without issue; the fifth attained twenty-one a succeeded his brother in the title, and was living at the period distribution. *Held*, that the second son was the "eldest son within the meaning of the settlement, and as such was to excluded from any share, but the fifth son was entitled to take share: *Re Rivers* (1870), 40 L. J. Ch. 87; 19 W. R. 318. T reports differ as to whether the fifth son took any interest in t family estate, and as the decision turned on the precise words of t settlement, which were very special, the case is not of much gene importance.

A by deed appointed a sum of money in trust for his daught B for life, with remainder "in trust for the child, if only one, all the children, except an eldest or only son, if more than one," B, who, either before or after the determination of the previo trusts, should attain twenty-one or marry, and if more than o equally. A died; then B's eldest son C attained twenty-one a died; then B died, leaving her second son D, who had attain twenty-one, and a daughter. At the date of the deed, certa estates stood limited, by a settlement, to which A was a part to the use of B's husband for life, with remainder to his sons by successively in tail. *Held*, that, as the provisions were not a father, and as there was no reference in the deed of trust to t settlement of the estate, and there was nothing to show that had the settlement in his mind at the time of the appointme except that he was a party to it, the phrase "eldest son" mea eldest son at the time of vesting, so that D who had subsequen to that time become the "eldest son" took a share in the fun *Domvile* v. *Winnington* (1884), 26 Ch. D. 382; 53 L. J. Ch. 7

What evidence sufficient to connect deed providing for eldest child with deed providing for younger children.

It is impossible to say what evidence is sufficient to connect deed, by which provision is made for "younger children," wi another instrument by which provision is made for an "eld son," but not referred to in such deed, so as to bring the ca within the rule. In *Teynham* v. *Webb* (1750), 2 Ves. Sen. 1 where the rule was applied, the nature of the evidence is n stated; in *Sandeman* v. *Mackenzie*, *supra*, where the rule w not applied, there is no statement how the eldest son took; *Domvile* v. *Winnington*, *supra*, where the rule was not applie the mere fact that the settlor was a party to the deed under whi the eldest son took the estates was held insufficient to make t rule applicable.

Where portions exceed whole value of the estate.

The fact that, owing to a change in the value of the estate arged with the portions, the amount of the portions exceeds the lue of the residue of the estate will not entitle a younger son coming the eldest to claim a portion : *Reid* v. *Hoare* (1884), 26 . D. 363; 53 L. J. Ch. 486.

"Besides"; "other than."

Where provisions are made for children "besides" an eldest n, no children take unless there is a son; while, if the provisions for children "other than" an eldest son, the younger children ke whether there is a son or not : *Walcott* v. *Bloomfield* (1843), Dr. & War. 211, at p. 235; 6 Ir. Eq. R. 227; cited and discussed *Simpson* v. *Frew* (1856), 5 Ir. Ch. R. 517, at p. 525.

CHAPTER XXVI.

VESTING OF GIFTS TO CLASSES.

Vest defined: Class defined: Gift to Class and A where A is Member of it: Where A is not a Member of it: Composi Class : Immediate Gift to Class : To "A and his Eldest Child" Gift in Remainder to Class: Vesting notwithstanding Existen of Power: Implied Interest in Default of Appointment: Whe Appointment Testamentary only.

THIS chapter contains the general rules as to vesting of gif to classes applicable to deeds of every nature; the special rul applicable to portions charged on land and to settlements personalty made by a parent or a person *in loco parentis* a collected *infra*, Chapter on Portions.

Meaning of "vest."

The meaning of the word "vest" is discussed in Fearne, C. 1; and Hawkins on Wills (3rd ed.), pp. 263 *et seq.*, where it observed that "the only definition that can be given of the wo 'vested' in English law, as applied to future interests other th remainders, is, that it means 'not subject to a conditi precedent.'"

The rules as to the vesting of real estate are fully discussed Fearne, C. R.; and are therefore only incidentally referred here.

Meaning of "class."

The meaning of the word "class" has been much discusse but always in cases on wills. The cases are collected in Lo Davey's speech, in *Kingsbury* v. *Walter*, [1901] A. C. 187; L. J. Ch. 546, in which speech are contained examples of wh are classes within the ordinary meaning of the word, and wh have been held to be such on the context in special cases. Lo Davey says (p. 192): "*Prima facie* a class gift is a gift to class consisting of persons who are included and comprehend under some general description and bear a certain relationship the testator. That definition is in accordance with that given Lord Selborne in the case referred to in North, J.'s, judgmen *Pearks* v. *Moseley* (1880), 5 Ap. Ca. 714; 50 L. J. Ch. 57; and Lord Hatherley, then Wood, V.-C., in a case which has also be referred to at the Bar: *Re Chaplin's Trust* (1863), 33 L. J. Ch. 18 143 R. R. 323. But it may be none the less a class because some

Class consists of persons comprehended under general description.

e individuals of the class are named. For example, if a gift is de 'to all my nephews and nieces, including A,' or if a gift is de 'to C and all other my nephews and nieces,' each of those uld be a class gift. *Stanhope's Case* (1859), 27 Beav. 201; 122 R. 371, is an example; there the gift was to four named daughters d all his after-born daughters, and that was rightly, as I think, d to be a class gift. To the same effect is a case before Chitty, J., *Jackson* (1883), 25 Ch. D. 162, where the gift was to five named lividuals, and all his other sons and daughters who should be rn afterwards and attain the age of twenty-one years. Chitty, J., d that that was a class gift, although the condition of attaining e age of twenty-one years was imposed upon the other children d not upon those who were named. He came to this conclusion on the ground that it appeared from the evidence that those who re named had already attained the age of twenty-one years. . . .

Some individuals may be named.

ere may also be a composite class, such as, for instance, children A and children of B; that would be a good class. On the other nd, a gift to A and all the children of B is, in my opinion, *prima ie* not a class gift, and I think that has been so decided, and htly decided, in the case of *Re Chaplin's Trust* (*supra*), which I ve already referred to, and also in a case before Sir George Jessel *Re Allen; Wilson* v. *Atter* (1881), 29 W. R. 480; 44 L. T. (N.S.)). There was in that case a direction 'to divide equally amongst the children of R W, the child of W W and L, his wife, and W, the widow of J W, share and share alike.' It was held that s was not a gift to a class, and that the share lapsed. . . . I nk those cases were rightly decided, and I do not agree with the position, which I understand to be laid down by Romer, L.J., o says: 'In my opinion it is correct to say that a gift by will to lass properly so called, and a named individual such as A equally, that the testator contemplates A taking the same share that each mber of the class will take, is *prima facie* a gift to a class.' I nk that that is contrary to the established authorities and to the nciples applicable to this branch of law. But, my Lords, it is fectly plain that a gift in the form which I have mentioned may a class gift, if there is to be found in the will a context which will w that the testator intended it to be a class gift. I think the e result may be arrived at if the Court, putting itself into the e position as the testator occupied, with the same knowledge the testator had when he was writing his will, comes to the clusion that the gift, although expressed in the form of a gift an individual and the children of A, was intended to operate a class gift. There is abundant authority for that proposition. ill only mention two cases before Lord Romilly. The case of *inall* v. *Duckworth* (1866), 35 Beav. 307; 147 R. R. 178, appears

Composite class, as children of A and children of B.

A and children of B not a class,

but may by context be a class.

to me to be exactly this case. It was a gift unto and equall amongst the testator's nephew A and the children of his sister as tenants in common. Lord Romilly held that that was a gi to a class. . . . Another principle which is, I think, establishe in this branch of the law, is that all the interests of member of the class must vest in interest at the same time. For instanc if there is a gift to A for life, and afterwards to B, and the childre of C, the class must vest in interest at the death of the testato although it is capable of enlargement by the birth of subsequen children of C during the lifetime of the tenant for life. My Lord it is, I conceive, on that ground that the other case to which referred, namely, *Drakeford* v. *Drakeford* (1863), 33 Beav. 43, 48 140 R. R. 10, was decided. The learned Judge, Lord Romilly there said that the gift which he had before him in that case wa not a class gift. It was in this form—a gift to A for life, and a his death to be equally divided between his surviving children an the testator's niece, R W. There, as your Lordships see, onl those children who survived the tenant for life would have taken whereas R W's interest would have become vested at the testator death. On that ground Lord Romilly held that it was not a class.

Class must take in interest at same time.

A class is not the less a class because a particular member excluded.

Some individuals may be excluded.

If the class be what Lord Davey in the above passage calls composite class, *i.e.*, a class consisting of the children of A and th children of B, or what he holds is a class only in special circun stances, *i.e.*, a class consisting of an individual and the childre of A—

> The members of a composite class, or a individual and the members of a class, take *pe capita*: *Fletcher* v. *Fletcher* (1882), 9 L. R. I 301.

Members of composite class, or individual and class, take *per capita*.

With regard to the persons to take under limitations to, trusts for, a class, it may be laid down that—

> An immediate provision for persons forming class, as "children," or "issue," vests in thos only who are in existence at the date of the dee unless the contrary is expressed, and as joi tenants.

Immediate gift to class vests only in those then alive.

"B, having divers sons and daughters, A giveth land to *et liberis suis, et a lour heires*, the father and all his children take a fee simple jointly by force of these words 'their heirs'; b

he had no child at the time of the feoffment, the child born erwards shall not take" : Co. Litt. 9 a.

"In all grants of estates in lands there must be a person *in esse* take at the time the estate vests by the grant; therefore, in case a feoffment to one and his children and their heirs, if he has ildren at the time, the father and all his children take jointly in ; but if he has no child, the father alone takes; an after-born ild cannot take, for the gift was immediate" : *per Downes*, C.J., *one* v. *Odell* (1811), 1 Ball & B. 449, at p. 458; 15 R. R. 20.

Demise to A and B, his wife, *et eorum primogenitae proli succes-be* : they had then no issue, but afterwards had issue. *Held*, that ter the death of A and B, the issue could take nothing, as he was t *in esse* at the time of the grant, and by the grant he was to take ntly : *Stevens* v. *Lawton* (1587), Cro. Eliz. 121; *S. C. sub nom. ephen's Case*, Owen, 152.

Immediate trust "for the children of A, who at that time had ree children and now hath six." *Held*, that the trust fund longed to the three only : *Warren* v. *Johnson* (1673), 2 Rep. in . 36.

It has been thought that a limitation to "A and his eldest ild," gave an estate in remainder to the child if he was not born the date of the limitation : see *per* Saunders, Serj., *arguendo*, *lthirst* v. *Bejushin* (1551), Plowd. 21, at p. 29 a; *per* Mounson, J., *Brent's Case* (1575), 2 Leon. 14; and *per* Houghton, J., *Tyler* v. *sher* (1620), Palm. 34; but this is erroneous (see the *Prior of imesby* v. *B.*, Y. B. 17 Edw. 3 (1343), 29, pl. 30; Y. B. 18 lw. 3 (1344), 59, pl. 91; 2 Roll. Abr. 417, pl. 8), for if the ild had been *in esse* at the time, he would have taken jointly, d as he was incapable of doing so, he could take nothing : *elley's Case* (1581), 1 Rep. 93 b, at p. 101 a.

"To A and his eldest child."

The rule applies to a class to take by way of appointment.

Rule applies to appointments.

Demise to a husband, his wife, "and their children at the signment of the husband." There was but one child at the date the lease, but afterwards others were born. The wife died in the etime of the husband. The husband assigned to a child born ter the date of the deed. *Held*, that he took no interest : *Cole & iendship's Case* (1584), 1 Leon. 287.

A trust for the children of a third person who attain twenty-one ses when the first child attains twenty-one : *Re Knapp's Settle-ent*, [1895] 1 Ch. 91; 64 L. J. Ch. 112.

Gift in remainder to class vests in all alive when it falls into possession.

A provision [by way of use of realty, or] by way of trust of realty or personalty, in remainder to persons forming a class, as "children," or "issue," vests in those who are in existence at the

date of the deed, subject to opening and letting i all who come into existence before the remainde falls into possession: and if none are in existence a the date of the deed, it vests in the first who come into existence, subject to opening and letting in a who come into existence before the remainder fall into possession.

It used to be thought that children born after the date of th deed could not take; thus when A levied a fine to the use of B fo life, and after to the use of the children of C, *procreatis*: C, a the time of the fine, had two sons, and before the death of B ha two daughters, it was held that the daughters could not take *Frederick* v. *Frederick* (1594), Cro. Eliz. 334; but this case mus be considered as overruled.

Realty.

Limitation in remainder "to the use of the issues female o the body of A and the heirs of their bodies," A having then n daughter. *Held*, that all the daughters of A, born before th expiration of the prior limitations, took as joint-tenants for life with several inheritances: *Matthews* v. *Temple* (1698), Comb. 467 *S. C. sub nom. Earl of Sussex* v. *Temple*, 1 Ld. Raym. 310.

By marriage settlement lands were settled upon the husband fo life, with remainder to the issue of the marriage, in such shares etc., as he should appoint, and in default of appointment, to th issue, share and share alike. *Held*, that the several children of th marriage, as they respectively came into existence, took immediat vested interests, liable to be divested by an exercise of the power *Heron* v. *Stokes* (1842), 2 Dr. & War. 89; 1 Con. & L. 270 3 Ir. Eq. R. 163; 4 Ir. Eq. R. 284; 59 R. R. 652.

Leaseholds.

Trust of leaseholds in a marriage settlement, after the deaths o the husband and wife, for the children as they should appoint, an in default of appointment for all the children equally. *Held*, to b a vested remainder, which opened to let in the children as the came into being: *Lawrence* v. *Maggs* (1759), 1 Ed. 453.

W and G (two brothers) being absolutely entitled (in certai events which happened) as tenants in common to leasehold houses by deed, made in 1840, assigned the premises to S upon trust fo M for life; and after the death of M, to the use of S; and after th death of S, in trust for the children of W and G "respectively, in such shares as they or either of them might appoint; and i default of appointment, then to and amongst the said childre equally and share alike. W by will purported to appoint all th premises to his then only child W F, and died in 1869 withou leaving any other child surviving. G died, leaving several childre and without making any appointment; and M and S also died

ld (affirming the decision of the Court below), that the children both W and G living at the date of the deed of 1840, and subquently born were the objects of the non-exclusive power, and o the objects to take in default of appointment; and that, there ving been only an exclusive exercise of the power, all such ldren became entitled; and that they took *per capita* : *Fletcher Fletcher* (1882), 9 L. R. Ir. 301, on app. from 7 L. R. Ir. 40.

Personalty.

Marriage settlement of personalty on trust for the wife for life, nainder for her children as she should appoint, and in default of pointment for the children equally. *Held*, that the interests of children vested at birth, liable to be divested by an appointnt : *Gordon* v. *Levi* (1758), Amb. 364; *Vanderzee* v. *Aclom* '99), 4 Ves. 771.

Realty and personalty mixed.

Covenant on marriage by the husband to settle all the real and sonal estate, of which he should die seised or possessed, on his e, if surviving, for life, with remainder, after the death of nself and his wife, for all the children of the marriage equally. *ld*, that all the children became entitled to vested interests on ning into existence : *Naylor* v. *Wetherell* (1830), 4 Sim. 114; L. J. (o.s.) Ch. 125; 33 R. R. 95.

Gift by direction to pay to, etc.

This and the previous rule apply where the provision for the ldren is effected by a direction "to pay" : *Vanderzee* v. *Aclom* '99), 4 Ves. 771; "to pay, apply, or dispose of" : *Re Minor's ust* (1860), 28 Beav. 50; 126 R. R. 20; "to transfer, assign, l make over" : *Jopp* v. *Wood* (1865), 2 De G. J. & S. 323; L. J. Ch. 625; 139 R. R. 113; or "to divide among" : *Lambert Thwaites* (1866), L. R. 2 Eq. 151.

Gift confined to members of class living when remainder falls in.

The limitation or trust may of course be confined to such of the sons forming the class as shall be living when the remainder s into possession : *Re Edgington* (1855), 3 Drew. 202; 106 R. R. 311; *Re Wollaston's Settlement* (1860), 27 Beav. 642; 122 R. R. 572.

Vesting under express limitations in default of appointment.

The existence of a power of appointment does not prevent interests, taken under express limitations in default of appointment, from vesting until and in default of appointment. See *per* Kindersley, V.-C., *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151, at p. 155; 35 L. J. Ch. 406.

In *Leonard Lovie's Case* (1614), 10 Rep. 78 a, at p. 85 a; *S. C. nom. Prowse* v. *Worthinge*, 2 Brownl. & G. 103, it was oneously decided that the interests taken in default of appointnt were contingent; and the same view was originally taken by d Hardwicke, C., in *Walpole* v. *Conway* (1740), Barn. Ch. 153;

but in *Cunningham* v. *Moody* (1748), 1 Ves. Sen. 174, he appears have altered his opinion; see *per* Lord Kenyon, C.J., *Doe* v. *Mart* (1790), 4 T. R. 39, at p. 64; 2 R. R. 324, and *Doe* v. *Dorvell* (1794 5 T. R. 518, at p. 521; 2 R. R. 662.

"Nothing is better settled than that where there is a power appointment to a class, and in default of appointment over to th or another class, this class takes a vested interest, subject to divested by appointment. There was some doubt upon this several cases; but the rule was settled by *Doe* v. *Martin* (*supra*)" *per* Sugden, L.C., *Heron* v. *Stokes* (1842), 1 Con. & L. 270, p. 283; 59 R. R. 652. "The rule is settled that no gift over on contingency can prevent the previous estate from vesting. If th contingency happens the prior vested estate will be divested": *p* Sugden, L.C., *Heron* v. *Stokes* (1842), 2 Dr. & War. 89, at p. 11 "It is the clear and settled law of the land that a gift in defau of appointment gives vested interests to all the objects of the powe subject to be divested by its exercise": *per* Sugden, C., *Heron* *Stokes* (1842), 4 Ir. Eq. R. 284, at p. 285 (12 Cl. & F. 161; R. R. 83), and see at pp. 297, 298, on appeal from 3 Ir. Eq. R. 16

Realty. Money by marriage articles to be laid out in land to be settle subject to life interests of husband and wife, for the children as th should appoint, and in default of appointment equally, if one that one in tail. There was but one daughter. *Held*, that s took a vested estate tail: *Cunningham* v. *Moody* (1748), 1 Ves. Se 174.

Limitation in marriage settlement to use of wife and husba successively for life, remainder to the use of all and every the chi or children of the marriage for such estates, etc., and in su parts, etc., as the husband and wife should by deed, or as t survivor of them should by deed or will appoint, and in default the children equally as tenants in common in fee. *Held*, that t interests in default of appointment were vested: *Doe* v. *Mart* (*supra*); *Doe* v. *Dorvell* (*supra*); *Smith* v. *Camelford* (1795), Ves. Jun. 698; 3 R. R. 36; *Cox* v. *Chamberlain* (1799), 4 Ves. 63 at p. 636; 4 R. R. 311; *Campbell* v. *Sandys* (1803), 1 Sch. & L 281; 9 R. R. 33; *Osbrey* v. *Bury* (1808), 1 Ball & B. 53; *Heron* *Stokes* (1842), 2 Dr. & War. 89; 1 Con. & L. 270; 3 Ir. Eq. R. 16 4 Ir. Eq. R. 284.

Personalty. Term created under a power to raise money for all and eve the children of T in such parts, shares, and proportions as T shou appoint, and in default equally. T never appointed. *Held*, th the children took vested interests: *Teynham* v. *Webb* (1751), Ves. Sen. 198; *Gordon* v. *Levi* (1758), Amb. 364, where t marginal note is incorrect; *Cholmondeley* v. *Meyrick* (1758), 1 E 77; *Lawrence* v. *Maggs* (1759), 1 Ed. 453; *Mostyn* v. *Most*

44), 1 Coll. 161; 66 R. R. 41; *Rooke* v. *Rooke* (1761), 2 Ed. 8; *nes* v. *Redington* (1844), 1 Jo. & Lat. 589; 7 Ir. Eq. R. 405; R. R. 349, the two last-mentioned cases being cases on marriage cles.

Even if the power is to appoint by will only, the rule as to vesting until and in default of appointment is the same.

Where power is by will only.

By post-nuptial settlement freeholds were conveyed to trustees, trust to pay the rents to A and his wife during their respective s, and, after the death of the survivor, to sell and divide the eeds among all and every the children of A in such shares proportions as he should by will appoint. *Held*, that the perty was vested in all the children, subject to be divested by exercise of the power, and that, the power not having been rcised, the representatives of a deceased child were entitled is share: *Lambert* v. *Thwaites* (1866), L. R. 2 Eq. 151.

Cesser of life interest.

A power of appointment by deed or will given to the survivor usband and wife held to have become inoperative, the husband's rest in the settled fund having ceased owing to his insolvency his wife having died: *Haswell* v. *Haswell* (1860), 2 De G. F. & 56; 30 L. J. Ch. 97.

Contrast this with *Re Master's Settlement*, [1911] 1 Ch. 321; L. J. Ch. 190, where it was admitted that the husband's power appointment still subsisted, notwithstanding the cesser of his interest.

Implied trust in default of appointment.

Where there is a power of appointment among a class, but no express trust in default of appointment either for that class or for any other class or individual, or there is such a trust to arise only on failure of objects of the power, there is implied, in default of appointment, a trust for the class of persons who are capable of taking under an appointment in pursuance of the power; and the members of such class take vested interests until and in default of appointment as tenants in common: *Re Susanni's Trusts* (1877), 47 L. J. Ch. 65; *Wilson* v. *Duguid* (1883), 24 Ch. D. 244; 53 L. J. Ch. 52; followed in *Re Llewellyn's Settlement*, [1921] 2 Ch. 281; 90 L. J. Ch. 493.

'The general principle seems to be this: If the instrument f gives the property to a class, but gives a power to A to appoint

in what shares and in what manner the members of that class sh take, the property vests, until the power is exercised, in all t members of the class, and they will all take in default of appoi ment; but if the instrument does not contain a gift of the proper to any class, but only a power to A to give it as he may think among the members of that class, those only can take in default appointment who might have taken under an exercise of the pow In that case the Court implies an intention to give the property default of appointment to those only to whom the donee of t power might give it" : *per* Kindersley, V.-C., *Lambert* v. *Thwai* (1866), L. R. 2 Eq. 151, at p. 155; and for a case where the pow given was improperly exercised, see *Fowler* v. *Hunter* (1829), Y. & J. 506, where A voluntarily executed a bond to C, the wid of his creditor, in payment of part of the debt owing by A to husband. The money in respect of which the bond was given w expressed to be for the use of C and her children, but at her dispos Subsequently A executed a further bond to C for the remainder the debt for the use and benefit of C and her children only, in wh proportion among the latter she may think proper to direct, but no other use, purport, or intent whatsoever. C had ten childr *Held* (*inter alia*), that an exclusive appointment by C in favour two of her children was void and that all the children took tenants in common.

Settlement of leaseholds on trust for husband and wife for th lives, and if they should have issue then, after the decease of t survivor, to go to such issue, in such proportion, manner, and fo as they or the survivor should appoint; the wife survived t husband; there was one child only, who died before the wife; appointment was made. *Held*, that the child took: *Madoc Jackson* (1789), 2 Bro. C. C. 588; *Fenwick* v. *Greenwell* (1847), Beav. 412; 76 R. R. 154.

Trust in remainder for C for life, and after his decease on tr to assign amongst such of his children, and in such manner, shar terms, and proportions, as he should by any writing appoint. died without exercising his power, having had several childr Three of them died before him, two after him and before t determination of the interests prior to C's life interest. *Held*, th all C's children took vested interests: *Wilson* v. *Duguid* (1883), Ch. D. 244; 53 L. J. Ch. 52.

Power testamentary only.

It follows that where the power is to appoint by will only, no but persons who survive the donee of the power form the class a are capable of taking under the implied gift in default of appoi ment: *Sinnet* v. *Walsh* (1879), 5 L. R. Ir. 27; and consequen interests under the implied gift are defeasible on death before th of the donee of the power.

Settlement of fund after the deaths of A and B for such endants of C as B should appoint by will. *Held*, power in the ure of a trust for descendants of C living at B's death, entitling h descendants in equal shares as tenants in common in default of ointment, and that an appointment to the legal personal repre- atives of descendants of C who died before B was unauthorised : *Susanni* (1877), 47 L. J. Ch. 65.

Of course, the class may, even where the power to appoint is only by will, be expressed to be surviving children, and in that only children who survive are members of the class : *Winn Fenwick* (1849), 11 Beav. 438; 18 L. J. Ch. 337; 83 R. R. 216. however, the remarks of Kindersley, V.-C., on this case in *nbert* v. *Thwaites* (1866), L. R. 2 Eq. 151, at p. 159.

Express gift in default of exercise of power.

If there is an express gift over in default of any exercise of the er (not in default of objects of the power) to persons other n the objects of the power, such express gift of course prevents implication of a gift to such objects : *Jenkins* v. *Quinchant* 57), 5 Ves. 596, n.; see at p. 601.

Where a term was limited to raise for portions such sums, not eeding £1,000, as the husband should appoint to be divided as husband should appoint, and in default equally, it was held by dy, L.C., that no portion was raisable unless the husband made appointment : *Simpson* v. *Frew* (1856), 5 Ir. Ch. R. 517, ersing 4 Ir. Ch. R. 428.

As to the right of persons claiming in default of appointment bring an action to set aside a fraudulent appointment, after n persons have entered into a deed of compromise which pro- led upon the footing that the fraudulent appointment was a d one, see *Cloutte* v. *Storey*, [1911] 1 Ch. 18; 80 L. J. Ch. , which decided that a purchaser for value without notice of perty gets no title to the appointed property, where the perty was fraudulently appointed under a power operating over equitable interest only.

New Law.

The decision in *Cloutte* v. *Storey*, *supra*, is somewhat modified section 157 of the Law of Property Act, 1925, which provides a "purchaser in good faith" (as defined by the section) who r 1925 claims property under an instrument purporting to rcise a power of appointment over such property shall be pro- ed from the consequences of a fraud on the power. But the pointee must be one of those who take in default of appoint- t, and the protection so afforded shall not extend to any ss in amount or value of the interest appointed over the rest in such property to which immediately before the execution he instrument the appointee was presumptively entitled under

New Law. the trust in default of appointment, having regard to any advar in his favour and to any hotchpot provisions.

By sub-section 3, "Persons deriving title under any purcha entitled to the benefit of this section shall be entitled to the benefit."

It may be worth noting that by section 1, sub-section 7 of Law of Property Act, 1925, "every power of appointment ov or power to convey or charge land or any interest therein, whet created by a statute or other instrument or implied by law, whether created before or after the commencement of this (not being a power vested in a legal mortgagee or an estate ow in right of his estate and exercisable by him or by another per in his name and on his behalf), operates only in equity." Su powers are referred to in the Law of Property Act, 1925, "equitable powers" (sub-section 8). See also section 205, s section 1 (xi).

CHAPTER XXVII.

PORTIONS.

ns charged on Rents and Profits are charged on Corpus: Rent-charges charge Corpus: Sums payable at Fixed Time carry Interest: Portions charged on Land vest at Twenty-one or Marriage if no Time fixed for Payment: Portions charged on Rents only vest when Rents become applicable: Portions charged on Land payable on Event personal to Portionist do not vest previously: Postponement of Payment for Convenience of Estate has no effect on Vesting: Contingent Portions charged by Parents carry Interim Maintenance: Contingent Portions only raised if Contingency happens: Personalty Portions vest at Birth: If Trust created by Direction to pay on Event personal to Portionist Portions vest on Event happening: Gift of Interim Interest does not accelerate Vesting: Divesting Clauses applied to Vesting not Payment: Unless Issue of Child dying before Payment take originally or by substitution: "Leave" read "have": All take if One survives: Recapitulation.

PORTIONS and charges are generally charged on the *corpus* of land out of which they are to be paid, but it sometimes happens t they are charged on rents only; when this is the case—

Charge on rents and profits is a charge on *corpus*.

A trust to raise a sum out of the rents and profits of land charges it on the inheritance, unless the context shows that annual rents and profits alone are meant.

"In general, where money is directed to be raised by rents and fits, unless there are other words to restrain the meaning, and confine them to the receipt of the rents and profits as they rue, the Court, in order to obtain the end which the party nded by raising the money, has, by the liberal construction of se words, taken them to amount to a direction to sell": *per* d Hardwicke, C., *Green* v. *Belcher* (1737), 1 Atk. 505.

"If a term was created to raise [a charge] by the rents and fits, I should say it might be done by sale or mortgage": *per*

Lord Thurlow, C., *Shrewsbury* v. *Shrewsbury* (1790), 1 Ves. Ju 227, at p. 234; 2 R. R. 101.

"The rule is that where there is a trust to pay, or to raise a pay, or to raise or pay, gross sums out of rents and profits, th means out of the estate; and you may sell it or mortgage it for t purpose of paying the gross sum, the reason being that the sum to be paid at once, and the rents and profits are not sufficient that purpose": *per* Jessel, M.R., *Metcalfe* v. *Hutchinson* (1875) Ch. D. 591, at p. 594; 45 L. J. Ch. 210 (a case on a will).

Examples.

Trustees directed to pay portions on fixed days out of the re and profits, which the rents and profits would not allow. *He* that they might sell: *Backhouse* v. *Middleton* (1671), 1 Ca. Ch. 1 See this case stated by Jessel, M.R., in *Metcalfe* v. *Hutchins* (*supra*), at p. 593.

Charge of portion, trustees to take the rents and profits of t land till the same shall be raised; sale decreed: *Sheldon* v. *Dorn* (1693), 2 Vern. 310. See also *Warburton* v. *Warburton* (170 2 Vern. 420.

Trusts of term to raise portions out of rents and profits. *He* that they might be raised by sale or mortgage: *Trafford* v. *Asht* (1718), 1 P. Wms. 415.

All the prior cases are discussed in *Allan* v. *Backhouse* (181 2 V. & B. 65; 13 R. R. 23 (a case on a will).

Context may show that annual rents only are charged.

The context may show that annual rents and profits only intended. Thus, where the trusts of a term for raising portio were to raise them "out of the rents and profits of the said premi and by leasing thereof" for lives or years; and no time was fix for payment of the portions, a mortgage of the term was declar invalid: *Ivy* v. *Gilbert* (1722), 2 P. Wms. 13; Pre. Ch. 58 affirmed in D. P. (1723), 6 Bro. P. C. 68; *Mills* v. *Banks* (172 3 P. Wms. 1, at pp. 7, 8; *Evelyn* v. *Evelyn* (1731), 2 P. Wm 659; *Okeden* v. *Okeden* (1738), 1 Atk. 550 (a case on a will).

Rentcharges charge *corpus*.

A rentcharge, or periodical payment charg on, or issuing out of, the rents and profits of lan is a charge on the inheritance, unless the conte shows that annual rents and profits alone are mean

A sale or mortgage of the land may be ordered to raise arre of the rentcharge: *Cupit* v. *Jackson* (1824), 13 Price, 7 at p. 733; 28 R. R. 735; *White* v. *James* (1858), 26 Beav. 1 28 L. J. Ch. 179; 122 R. R. 76; *Hall* v. *Hurt* (1861), 2 J. & 76; 134 R. R. 131; *Scottish Widows Fund* v. *Craig* (1882), Ch. D. 208; 51 L. J. Ch. 363 (where the earlier cases are discuss and *Graves* v. *Hicks* (1841), 11 Sim. 551; 10 L. J. Ch. 185;

R. 425 (a case on a will) is distinguished); *Re Tucker*, [1893] h. 323; 62 L. J. Ch. 442; *Hambro* v. *Hambro*, [1894] 2 Ch. ; 63 L. J. Ch. 627; but such an order is discretionary only, not as of course, *Hall* v. *Hurt*, *supra*; *Re Tucker*, *supra*; *nbro* v. *Hambro*, *supra*; and if the rentcharge be secured by erm, the term only, and not the fee simple of the land, can sold or mortgaged: *Blackburne* v. *Hope-Edwardes*, [1901] h. 419; 70 L. J. Ch. 99; and the context may show that the tcharge is payable out of income only: *Clifford* v. *Arundell* 59), 27 Beav. 209; 1 D. F. & J. 307; 125 R. R. 450.

The mere fact that he has never been in possession does not eve a mortgagee in fee of land subject to a rentcharge from liability of paying that rentcharge: *Cundiff* v. *Fitzsimmons*, 11] 1 K. B. 513; 80 L. J. K. B. 422.

As to whether an annuity is charged upon the income or *pus*, see *Re Watkin's Settlement*, [1911] 1 Ch. 1; 80 L. J. 102.

All capital sums charged on land, and payable at a fixed time, carry interest from the time fixed for payment, though not so expressed in the deed creating the charge.

Capital sums charged on land payable at fixed times carry interest.

"Now I take it to be settled at the present day that if you l in any settlement a provision that a sum of money is to be rged on land and the money is to be paid at a fixed time, the n itself being fixed, then, as between the owner of the land and person entitled to the money, although nothing is said in the tlement as to interest, in the eye of a Court of Equity from date fixed for payment of the money that money bears interest. . So in the case of portions raisable out of land at a fixed e and to a fixed amount they certainly bear interest": *per* mer, L.J., *Re Drax*, [1903] 1 Ch. 781, at p. 794; 72 L. J. Ch. . "It is equally well settled in the case of a portion that, hough no mention is made of interest, yet it is a charge which ries interest at the rate current in the country in which the d charged is situate. For that, *Balfour* v. *Cooper* (1883), 23 D. 472; 52 L. J. Ch. 495, is a clear authority": *per* Cozens-rdy, L.J., *Re Drax*, *supra*, at p. 796.

Rate of interest.

The rules as to the vesting of portions differ according as they charged or not charged on land: see *per* Lord Hardwicke, C., *nham* v. *Webb* (1751), 2 Ves. Sen. 198, at p. 207. They have y been established after considerable differences of opinion, and *ta*, and even decisions, of eminent Judges will be found not in ordance with the rules.

When portions are vested.

There is no rule of law or equity which prevents a settlor fro directing, or empowering the donee of a power of appointment direct, the vesting of portions at any time the settlor or don may choose. The following rules are rules of constructio applicable only in the absence of clearly expressed intentions to the time of vesting :—

Portions charged on land.

"1. That powers to appoint portions charged on land ought, their language is doubtful, to be construed so as not to authori appointments vesting those portions in the appointees before th want them, that is, before they attain twenty-one or (if daughte marry.

"2. That where the language of the power is clear a unambiguous, effect must be given to it.

"3. That where, upon the true construction of the power a the appointment, the portion has not vested in the lifetime the appointee, the portion is not raisable, but sinks into t inheritance.

"4. That where, upon the true construction of both instr ments, the portion has vested in the appointee, the portion raisable, even although the appointee dies under twenty-one, (if a daughter) unmarried": *per* Lindley, L.J., *Henty* v. *Wr* (1882), 21 Ch. D. 332, at p. 359; 51 L. J. Ch. 422.

These rules must apply equally to cases in which the portio are limited directly by the settlement itself, and not through t medium of a power. The question in either case is one of co struction (*per* Jessel, M.R., and Lindley, L.J., *Henty* v. *Wre* *supra*, at pp. 338, 355); in the former case, of the settleme only; in the latter, of the instrument conferring and that exercisi the power.

Where no time named for payment, portions charged on land do not vest before twenty-one, even if interest be given.

Where no time is named for the vesting payment of portions charged on land, they vest sons at twenty-one, and in daughters at twenty-o or on marriage, and not before, even thou interim interest or maintenance is given.

"There is considerable difficulty in reconciling all the authorit upon the question when a portion charged on land vests and wh it does not, and the Court has often struggled even against t words of an instrument in order to avoid coming to the conclusi that a portion charged on land in favour of a child vested bef such child attained twenty-one or married": *per* Lindley, L. *Henty* v. *Wrey*, *supra*, at p. 358.

Examples.

Settlement by owner of land on trust to pay his son and h £100 per annum, and then to make a provision of £100 apie

his younger children, sons and daughters, to be raised and paid ording to their seniority, and a maintenance in the meantime. *ld*, by Jefferies, L.C., that "whereas many of the younger ldren died in the lifetime of their father" (it is not stated that y died under twenty-one, but they probably did) "the adminis- tors of the children so dead should have no benefit of this vision, but the same should cease, but in case any of the ughters had been married in the lifetime of the father and died, husbands, as their administrators, should have had their rtions": *Brathwaite* v. *Brathwaite* (1685), 1 Vern. 334.

By marriage settlement a term was vested in trustees, to nmence after the death of the survivor of the father and mother, trust within twelve months after the death of the survivor to se portions for daughters. *Held*, that a daughter who died at age of five, after the father's death, and in the mother's life- ne, was not entitled: *Bruen* v. *Bruen*, or *Brewin* v. *Brewin* 702), 2 Vern. 439; Prec. Ch. 195; 1 Eq. Ca. Ab. 267, pl. 2 (where is added, "The daughter died within the year, but it does not so pear by this report").

Under a marriage settlement a father had power to create a m for raising portions for younger children, to be paid at such ne as the trustees should appoint; the father limited the term and d. *Held*, that a younger child who survived the father and died der twenty-one, the trustees not having, as to him, made any pointment, took nothing: *Warr* v. *Warr* (1702), Prec. Ch. 213. *elyn* v. *Evelyn* (1731), 2 P. Wms. 659, is to the same effect.

By a resettlement made by a widow, tenant for life in possession, d her eldest son, a sum of £2,500 was charged, to be raised at the d of twelve years after the widow's death, to be paid to the unger children "in the following proportions, *viz.*, £1,000 to" and £500 to each of the three daughters, to be paid to them spectively when raised, and until raised, £150 annually was to be id out of the rents and profits by way of maintenance. J subse- ently died under twenty-one in his mother's lifetime. *Held*, that e £1,000 was not to be raised. Lord Manners, C., said: "The neral rule is, that where there is a charge upon land, with or thout interest, payable at a future day, it shall not be raised nen the party dies before the time of payment; the exception to at rule is, where the time of payment is postponed for the nvenience of the estate, *i.e.*, where the person is of capacity to ceive and to have occasion for the charge, but the estate is not in situation to pay; as, for instance, if an estate be limited to A for e, remainder to B, charged with a sum of money for C, payable the death of A; if C should die before A, yet the representative C would be entitled: for A had the estate disencumbered, and

Interim maintenance.

the money could not be raised in his lifetime, but C had a veste interest in the charge, as well as the remainderman in the esta charged" : *Ruby* v. *Foot* (1817), Beatt. 581.

By a deed charging portions in exercise of a power containe in a will, the appointor charged the estates with the sum of £2,0 for the portions of the daughters of his marriage to be raised with three calendar months after his decease, and to be forthwith pa to the portionists. *Held*, that the representatives of a daught who attained twenty-one and died in her father's lifetime we entitled to a portion (but, *per* Turner, L.J., the point not arisi for decision, that daughters who died minors and unmarried did n take a portion) : *Remnant* v. *Hood* (1860), 27 Beav. 74; 2 De G. & J. 396; 30 L. J. Ch. 71; 129 R. R. 123.

In *Davies* v. *Huguenin* (1863), 1 H. & M. 730; 32 L. J. Ch. 41 11 W. R. 1040; 8 L. T. (N.S.) 443; 2 N. R. 101, where the trus of the term were to raise £6,000 for the portions of the childr (other than the eldest son), equally to be divided among them more than one, the representatives of a daughter who attain twenty-one and died a spinster in her parents' lifetime were he to be entitled (see 1 H. & M., at p. 743), while the representativ of a child who died an infant were held not to be entitled, a portion. *Davies* v. *Huguenin* was overruled on another poi in *Re Evered*, [1910] 2 Ch. 147; 79 L. J. Ch. 465.

The case of *Rivers* v. *Derby* (1688), 2 Vern. 72, must be co sidered as overruled, unless it can be supported on the ground th the portions were payable out of rents only : see *per* Jekyll, M.R *Evelyn* v. *Evelyn* (1731), 2 P. Wms. 659, at p. 672; and *Mayhe* v. *Middleditch* (1782), 1 Bro. C. C. 162, would probably not followed now as to the children who died under twenty-one, unle it can be supported on the words of the appointment, as to whi Lord Thurlow, C., said (at p. 165) : "It is clear all the childr were designed, according to the appointment. As to the time vesting, according to the instrument, without any time name they must vest immediately. This differs from all the cases, f this is a case where, after marriage and upon a view of an existi family, the parents have given portions to persons described."

Rule applied in favour of other portionists.

The rule will be applied for the benefit not only of the heir person taking the estate, but, if such an intention is expressed, f the benefit of the other members of the class of portionists : *Dav* v. *Huguenin* (1863), 1 H. & M. 730, at p. 746.

Appointors may vest portions at any time.

Notwithstanding the rule above mentioned, which is a rule construction only, an appointor may, in the absence of fraud a if the terms of the power so permit, make a portion vest in a ch at any time he thinks proper, and *a fortiori* portions may by t original instrument be so vested : *Henty* v. *Wrey* (1882), 21 Ch.

?, overruling the decision of Kay, J., 19 Ch. D. 492, and plaining *Lord Hinchinbroke* v. *Seymour* (1784), 1 Bro. C. C. 395, ich is apparently *contra*, on the ground that the appointment in it case was a fraud on the power.

A direction that portions be raised out of rents and profits only, quires that the appropriation of the rents and profits should mmence as soon as they become applicable for that purpose; and is difficult to conceive (in the absence of expressed intentions to e contrary) how it is possible that any of the portions should nain in contingency after the appropriation has once begun. It llows that—

Portions out of rents and profits only, vest as soon as rents become applicable.

> Where no time is named for the vesting or payment of portions charged on annual rents and profits only, as distinguished from *corpus*, every child who is alive at the time when the rents and profits begin to be applicable for providing the portions takes a vested interest.

By marriage settlement lands were limited in strict settlement, oviso that if there should be no issue male, and there should one or more daughters living at the husband's death, the trustees ould stand seised to the intent that such daughter and daughters ould receive £10,000 out of the rents, revenues, and profits, gether with £100 per annum apiece for maintenance, from the ath of the father till payment of the £10,000. The husband died thout male issue, leaving a daughter who died under twenty-one, thout having been married. *Held*, that she was entitled to her rtion: *Rivers* v. *Derby* (1688), 2 Vern. 72. To the same effect e *Evelyn* v. *Evelyn* (1731), 2 P. Wms. 659, at p. 671; *Cowper* v. *ott* (1731), 3 P. Wms. 119 (a will case). It should be observed at the decision in *Rivers* v. *Derby*, as reported in Vernon, was it, not on the ground of the portion being raisable out of the nts and profits, but only on the circumstance that no time was pointed for payment; but Jekyll, M.R., in his judgment in *velyn* v. *Evelyn*, appears to have considered that the vesting of e portion in *Rivers* v. *Derby* depended upon its being payable t of rents and profits.

When estate is discharged.

Where the portions are payable out of rents and profits only, e estate is not discharged as soon as the rents and profits amount a sum sufficient to discharge the portions, unless the portions ve been in fact paid.

By a marriage settlement a term of years was vested in trustees, trust to raise out of the rents and profits, by annual payments of 00 in each year, but not otherwise, the sum of £3,000 for

portions for younger children. *Held*, that the clause did not creat a charge for six years only from the date of the deed, and that no sum having been raised, the estate was not discharged at th end of the six years, although the rents during that time wer amply sufficient to have satisfied the charge : *Re Forster* (1869) Ir. R. 4 Eq. 152.

Portions charged on land payable on events personal to portionists do not vest previously, even if interest be given.

A portion charged on land and made payabl on the happening of some event personal to th portionist does not vest unless and until that even happens, even though interim interest or main tenance is given.

"It is very clear that charges on land, payable at a future day cannot be raised if the party dies before the payment; there is n difference at all, whether the charge is created by deed or will, no whether it is provided by way of portion for a child or given merel as a legacy by collateral relations or others. . . . I have ofte heard it said that the reason why legacies, etc., charged on land payable at a future day, shall not be raised if the legatee die before the day of payment, though it is otherwise in the case of charge on the personal estate, is this, that the heir is a favourit of a Court of equity, and ought to have the preference of th representative of a legatee, and likewise that the Court will go a far as they can in keeping the real estate entire, and as free fro incumbrances as possible. But I think the Court has never gon upon such reason; but the true reason I take to be this, that th Court will govern themselves, as far as is consistent with equity by the rules of the Common Law. In the case of personal estate the rule is the same here as in the Civil Law, that there ma be an uniformity of judgments in the differents Courts; but i the case of lands, the rule of the Common Law has always bee adhered to" : *per* Lord Hardwicke, C., *Prowse* v. *Abingdon* (1738) 1 Atk. 482, at p. 485.

"It is settled now, whether the portion charged upon land b given with or without interest, by deed or will, if the person die before the age at which it becomes payable, it shall sink into th estate" : *per* Lord Hardwicke, C., *Boycot* v. *Cotton* (1738), 1 Atk 552, at p. 555.

"It is a well-established rule as to portions or legacies payabl out of land, that if made payable at a certain age, or marriage o other event personal to the party to be benefited, and such part die before that time arrive, the portion or legacy is not to be raise out of the land" : *per* Lord Cottenham, C., *Evans* v. *Scott* (1847) 1 H. L. C. 43, at p. 57; 73 R. R. 4.

Examples.

A term of years was limited in a settlement on trust to raise ,000 for the daughters, and maintenance yearly not exceeding 0 per annum; if one daughter, £2,000, and if any daughter died, survivors or survivor, if more daughters than one, to have the rt of the daughters dying: *viz.*, if the father die without issue le, or having such issue male by his then wife, if such issue ould die in minority or unmarried, the trustees should out of the emises levy and raise £2,000 for the portion and portions of such ughter and daughters, together with a competent yearly mainnance for every such daughter and daughters not exceeding £20 r annum, and the £2,000 to be paid at twenty-one or marriage, hich should first happen. The father died, leaving one son, who d without issue, leaving a sister who died under age and married. *Held*, that she was not entitled to a portion: *Bond's se* (1685), 2 Ca. Ch. 165.

Term limited by a settlement to trustees for the raising of £4,000 iece for younger children for their portions to be paid them at eir respective marriages or ages of twenty-one years, which should st happen, and for paying unto them £100 per annum mainnance in the meantime. *Held*, by Guildford, L.K. (whose cision was afterwards affirmed in D. P.), that a child who died der twenty-one unmarried was not entitled to a portion: *Poulet Poulet* (1683), 1 Vern. 204; *Pawlett* v. *Pawlett* (1685), 1 Vern. 1; 2 Rep. in Ch. 286; 1 Eq. Ca. Ab. 267, pl. 1; 2 Vent. 366.

Interim maintenance.

Devise of £1,000 to a daughter for her portion charged on real tate and payable at twenty-one; the daughter dying before enty-one the portion sinks into the land: *Smith* v. *Smith* (1688), Vern. 92. To the same effect is *Rich* v. *Wilson* (1728), osely, 68.

Charge by a father, under a power in a settlement, of certain ms as portions for his several children, *nominatim*, to be paid to ch children as should have attained twenty-one before his death thin one year after his death, and to such child as should be der twenty-one at his death, to be paid to his sons at twenty-one, d to his daughters at twenty-one or marriage, which should st happen, the respective portions to be paid with interest at £5 r cent. from his death to the payment thereof. *Held*, that a ughter who survived the father and died under twenty-one took thing: *Boycot* v. *Cotton* (1738), 1 Atk. 552; *Gawler* v. *Standerck* (1787), 2 Cox, 15 (a case on a will).

Postponement of payment of portions charged on land for convenience of estate does

Where the actual raising and payment of a portion charged on land is directed to be postponed until the happening of a specified event, having reference to the circumstances of the land out of

not affect vesting.

which it is made payable, such direction does nc affect the time of vesting, which is not thereb postponed till the time of actual payment.

The result of this rule, taken in connection with the tw preceding rules, is that, if portions are made payable after th death of the tenant for life, then whether they are or are not mad payable at twenty-one, no child will take who does not attai twenty-one, but every child will take who attains twenty-on whether he survives the tenant for life or not.

This rule is distinguished from the preceding rule in Fearn C. R., 552 *et seq.* in the notes.

Examples.

Among the earliest cases on this rule are *Butler* v. *Duncomb* (1718), 1 P. Wms. 448, and *Pitfield's Case* (1728), 2 P. Wms. 51 The rule, however, was hardly thoroughly established so early a the dates of those cases, for in *Bradley* v. *Powell* (1736), Ca. t. Tall 193, where A, the father, and B, the eldest son, resettled a estate to the use of A for life, remainder to trustees for a term t raise £1,100 to be paid to C, the second son, within six years aft A's death, or as soon after as the same could be raised, and in th meantime interest from A's death for maintenance, and C attaine twenty-one, and died in A's lifetime; it was held, that he toc nothing. Stress was laid on the fact that the gift for maintenanc necessarily supposed him alive at his father's death, and that, th interest being contingent, the principal must also be contingent, bu this case was disapproved by Lord Hardwicke, C., in *Tunstall* v *Brachen* (1753), Amb. 167, at p. 170; and the rule was followed i *Lowther* v. *Condon* (1741), 2 Atk. 128 (a case on a will), and i *Emperor* v. *Rolfe* (1749), 1 Ves. Sen. 208, where a sum of mone was provided by a term after the mother's death for daughter portions to be payable at twenty-one or marriage, and if any shoul die before their portions became due and payable they shoul go to the surviving daughters, and it was held that a daughter wh attained twenty-one and died in the mother's lifetime was entitle to a portion.

By a post-nuptial settlement, an estate was limited to A and I successively for life, remainder for a term of years upon tru within one year after the decease of A and B to raise £850 for named daughter, R, her executors, administrators, and assign She was thirty years old at the date of the settlement, and die afterwards in A's lifetime. Clarke, M.R., said : " The represent tives are entitled; the present is not like the cases where portio are charged on land, payable at twenty-one or marriage, and th children die before either of those events happens : the portic sinks because by their death they could not want it. Here th

ghter was of age, and had occasion for the money. The tponing the payment was merely for the convenience of the ıer and mother and the estate" : *Smith* v. *Partridge* (1755), bl. 266, at p. 267. *Cholmondeley* v. *Meyrick* (1758), 1 Ed. 77; *ney* v. *Verney* (1761), 2 Ed. 26; and *Powis* v. *Burdett* (1804), es. 428, 7 R. R. 259, are cases to the same effect.

"It is a well-established rule as to portions or legacies payable of land, that . . . if the payment be postponed until the pening of an event not referable to the person of the party to be efited, but to the circumstances of the estate out of which the tion or legacy is to be paid, such as the death of a tenant for , then it will be raisable after the death of the tenant for life, ıough the term out of which it was to be raised had not arisen consequence of the party to be benefited not having been *in esse* the time of the death of the tenant for life, as in *Emperor* v. *fe* (1749), 1 Ves. Sen. 208; *Cholmondeley* v. *Meyrick* (1758), d. 77, and many other cases" : *per* Lord Cottenham, C., *Evans Scott* (1847), 1 H. L. C. 43, at p. 57; 73 R. R. 4. *Remnant* v. *od* (1860), 27 Beav. 74, on app., 2 De G. F. & J. 396, and *vies* v. *Huguenin* (1863), 1 H. & M. 730, are more modern cases which the rule was followed.

Interest is allowed on contingent portions charged by parents on land.

Where portions are charged on land by a parent or person *in loco parentis* and no maintenance is provided by the settlement, interest by way of maintenance will be allowed during the minority of the children, even although their interests are contingent.

"I think the general rule stated in Lewin on Trusts (10th ed.), 472, [(12th ed.), p. 488] is accurate. He says, 'It will be lected . . . that portions are so far considered vested as to ry with them such a rate of interest or such allowance as the ırt may deem necessary for the reasonable maintenance of the ldren.' I think that proposition is sound, and I adopt it": Farwell, J., *Re Greaves' Settled Estates*, [1900] 2 Ch. 683, at 686; 69 L. J. Ch. 596. In that case interest at the rate of er cent. per annum was allowed.

Probably interest cannot be allowed until the term for raising portions comes into existence: *Butler* v. *Duncombe* (1718), . Wms. 448; see *per* Farwell, J., *Re Greaves' Settled Estates*, *ra*, at p. 685.

Contingent portions only raised if

Of course if the term for raising the portions never comes into tence, or the contingency on which the portions are raisable

contingency happens.

never happens, no portions can be raised even for children wl attain twenty-one or, being daughters, marry.

Reversionary term in marriage settlement (in remainder aft the estates tail) in trust in case there should be no son, or if the should be a son, and he should die under twenty-one, and witho issue, then, by sale or rents and profits, in case the term shou have taken effect in possession, to raise £6,000 for the daughter daughters, payable at sixteen, if either the husband or wife shou be then dead; but if both should then be living, then within s calendar months after the death of either, with interest from tl death of husband and wife, or either; and in case any of tl daughters should die before the portion became payable, her sha to go to the survivors; proviso that if no daughter should be ali at the time of the failure of issue male, the portions should sin There was no son, and only one daughter, who attained sixtee and died, living both parents. The wife subsequently died wit out a son. *Held*, that, as there was a possibility of the birth of son at any time till the death of the wife, there was not a "failu of issue male" at the time of the daughter's death, but the provi was still operative at the subsequent death of the wife, a consequently the daughter was not entitled to a portion: *Gordon Raynes* (1732), 3 P. Wms. 134.

Realty settled on husband and wife in succession, remainder f a term on trust, if no issue male, or, if there were such, and th all died without issue male before twenty-one, and there should one or more daughter or daughters, then to raise portions. Provis that if there should be a son that should have issue male or atta twenty-one, the term should cease. A son attained twenty-o and died in his father's lifetime. *Held*, that portions were n raisable: *Worsley* v. *Granville* (1751), 2 Ves. Sen. 331.

If money is to be raised in any event the money is treated as a money fund.

Where portions are charged upon land but the sum payable f portions has to be raised in any event, that is, not only in the eve of there being persons entitled to portions, but, if there be no su persons, for the benefit of some person other than the portionis the portions are treated as being payable out of a money fund a not as portions charged on land, and the rules applicable portions payable out of such a fund are applied. Thus in *Teynho* v. *Webb* (1751), 2 Ves. Sen. 198, a term was created to raise mon for younger children; if none then for the eldest son, and if eldest son, for the executors of the appointor; Lord Hardwicke sa (p. 207), "that under the rules laid down and established in tl Court as to sums of money by way of portion or provision f children charged on land sinking into the estate, these cases a rules are not applicable, because in respect of the present part and the rights they claim I am of opinion this must not

sidered a sum of money charged on land. . . . The subject ter of the present consideration is a sum of money which must ll cases be raised out of the estate." Similar cases are *Reilly Fitzgerald* (1843), Dru. temp. Sugd. 122 (see p. 159); 6 Ir. R. 335 (see p. 352); *Re Dennis* (1857), 6 Ir. Ch. R. 422; *Howard* (1858), 7 Ir. Ch. R. 344.

Portions payable out of personalty.

The rules stated so far relate to portions charged on land; with ird to portions not charged on land, a legacy, not charged land, to A, payable at a future time or on an event certain, eld by the law of England, following the Civil Law (see rne, C. R. 552, note (g); 2 Spence, Eq. Jur. 395; *per* King, C., *ce of Chandos* v. *Talbot* (1731), 2 P. Wms. 600, at p. 612, note; Lord Hardwicke, *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 261, at 262; *per* Lord Loughborough, C., *Bolger* v. *Mackell* (1800), 5 . 509, at p. 513), to be *debitum in praesenti, solvendum in ro: i.e.* the payment only, not the vesting, is deferred: see Kindersley, V.-C., *Parker* v. *Hodgson* (1861), 1 Dr. & Sm. 568, . 573; 30 L. J. Ch. 590; 127 R. R. 215; and the same doctrine lies at common law to a promise or covenant for payment: Litt. 292 b; *Goss* v. *Nelson* (1757), 1 Burr. 226; and in equity rusts for payment: *Combe* v. *Combe* (1741), 2 Atk. 185. But er a promise to pay, or trust for payment to, A when, or if, an ertain event happens, A's interest is contingent, both at common and in equity.

"*Debitum in praesenti, solvendum in futuro.*"

The Courts must have been familiar with questions arising on s for a considerable period before settlements *inter vivos* of onalty were introduced; and it seems probable that the Court hancery, when called upon to deal with instruments of the latter s, adopted, or assumed the applicability of, the rules which it already received from the Civil Law and applied to legacies er wills; and it is obvious that burdening the common law ritance with a charge for younger children is a different thing declaring trusts of an existing fund of personalty, and that ons which would militate against the former have no application he latter.

Whether any distinction between wills and settlements.

As a general rule, the cases make no distinction between wills settlements in respect of the vesting of personalty portions. it is sometimes necessary to consider the different circumces of a testator and a settlor, or, as it has been called, "the rent characters of a will and settlement": see *per* Turner, V.-C., *arrer* v. *Barker* (1852), 9 Ha. 737, at p. 744; 89 R. R. 641.

t is difficult to find conclusive authority that the civil law rine of the immediate vesting of personal legacies payable at a re time applies to trusts of personalty under settlements, for in of the cases cited below there seem to have been special words;

it is, however, submitted that the following rule is, on the whol established :—

Personalty portions payable at twenty-one, vest at birth.

> A trust in a settlement, of personal propert for the children of A, payable at twenty-one, as to daughters on marriage, gives, if there are n further words, every child a vested interest at birt
>
> It follows that if a child dies an infant, an being a daughter without having been married, an whether in the lifetime of the parents, or of on of them, or not, the administrator of such child entitled to a portion.

"The settled distinction between a portion secured out of personal estate and one charged on land, which rule holds al with regard to legacies, *viz.*, if a legacy be given out of a person estate to J S, payable at his age of twenty-one, and he dies befo twenty-one, yet the legacy shall go to his executors" : *Per Curia* (King, L.C., Raymond, L.C.J., and Sir J. Jekyll, M.R.) *Gordon* *Raynes* (1732), 3 P. Wms. 134, at p. 138.

"Let us now consider the difference between a portion payal out of lands, and one payable out of personal estate; and t difference is, that if money be given to a man, payable when comes of age, and he dies before the day of payment, it shall go his executors; but, if it be a portion to be raised out of land it shall sink into the estate, for the benefit of the heir" : p Willes, C.J., *Harvey* v. *Aston* (1737), 1 Atk. 361, at p. 37 Lord Hardwicke (*ibid.*, at p. 379) speaks of "the differen between portions out of lands and personal *legacies*"; the ca before him was on a settlement, but, as before remarked, t authorities seem to make no distinction between deeds and w as to the present question.

Trust of £2,000, part of £3,000 vested in trustees for husba and wife for life, and after their deaths "for such son of the bo of the wife by the husband as shall live to attain twenty-one, wh and at such time as such son shall have attained to the age twenty-three years complete." *Held*, by Lord Hardwicke, C., th a son who attained twenty-one, but died under twenty-three, w entitled : *Combe* v. *Combe* (1741), 2 Atk. 185.

Opinions *contra*.

There are two decisions of Lord Hardwicke *contra*, *viz.*, th portions out of a money fund are subject to the same rules portions charged on land, and therefore do not vest until twen one or marriage : *Teynham* v. *Webb* (1751), 2 Ves. Sen. 198, whe though there was a term, the L.C. said (at p. 207) that the mon was not to be considered as charged on land; and *Hubert*

sons (1751), 2 Ves. Sen. 262; but it is submitted that these es are not in accordance with the law.

Examples.

By marriage settlement personalty was vested in trustees upon st for the wife for life, and within one year next after her ease, in default of appointment (which happened) to pay the ncipal and all arrears of interest to all and every her child and dren, part and share alike, and for want of such issue over. len, M.R., said that it was " a vested interest in all the children might ever have upon their respective births, to be devested the exercise of the power of appointment." The question for ision was whether a daughter who attained twenty-one, but died ore her mother, was entitled to a share: *Vanderzee* v. *Aclom* 99), 4 Ves. 771, see pp. 784 and 787.

" The terms of the settlement are very ambiguous. . . . I am opinion that the child did take a vested interest at the moment ts birth. . . . The grounds of my opinion are these—I think recital in the settlement . . . shows that this provision was nded to be and was considered as a money portion. . . . The ties contemplated the deaths of some of the children before nty-one or marriage, and accordingly they provided for such event by giving the share of the child so dying to the survivors, they only provided for such an event for the benefit of the other dren as a class; they did not go on to make any provision for event which has happened " [*viz.*, of there being one child only died an infant]. " I look upon this, therefore, as a money d raisable in the event stated ": *per* Sugden, L.C., *Reilly* v. *zgerald* (1843), 6 Ir. Eq. R. 335, at pp. 351; Dru. 122, at 157 *et seq.*

In *Hynes* v. *Redington* (1844), 1 Jo. & Lat. 589; 7 Ir. Eq. R. ; 68 R. R. 349, the fund was by articles (which, however, were executory, in the sense of being incomplete) agreed to be vested rustees in trust for all the younger children, to be paid in such res and at such times, etc., as the father should appoint, and in ault to be paid to such children equally; the shares of sons to aid at twenty-one, and of daughters at twenty-one or marriage, in the meantime, " until their portions should become able," to apply any sums not exceeding the interest of their shares respectively for or towards their maintenance. The er made no appointment. There were two daughters and one who all survived both parents, but subsequently one of the ghters died under age and unmarried. Sugden, L.C., said (1 Jo. at., at p. 604): " It was contended that the surviving daughter the whole fund by survivorship. There is no such gift ressed in the settlement; if she takes the whole, it must be by lication or construction, not by direct gift. There is no gift

of the whole fund to an only child attaining twenty-one years, ar
I find no authority which authorises me, upon any supposed ru
applying to gifts to a class, to hold that the only surviving chi
will take the whole fund, without a direction in the settlement f
that purpose. . . . The gift over to the son is in default of issu
of the marriage" (which did not happen). "The [ultimate] gi
over to the personal representatives of the husband shows that th
fund was not to go over unless there was an absolute failure
children." And further (7 Ir. Eq. R., at pp. 411, 412): "The gi
over satisfies me that the fund was not to go over unless there wa
an absolute default of other children. . . . The intention ma
have been to give the fund to the children who attained twent
one, but I cannot alter the plain legal construction of th
instrument. It is a trust for all the children. . . . They toc
vested interests as they were born, although their shares were n
to be paid till a particular age, with maintenance in the meantim
It would be desirable in a well-drawn settlement that it shoul
contain clauses of survivorship and accruer in case the childre
died under the age when the portions are payable. But there is n
such clause in this settlement, and I cannot introduce one."

In *Re Orme* (1850), 1 Ir. Ch. R. 175, a fund was settled
trust after the death of A to transfer it and all the interest, etc
unto and amongst all and every the child or children of th
marriage, or the issue of any such child or children who migl
happen to be *then* dead leaving issue, or to any one or more
such children, or issue of such deceased children, etc., at such age
times, and in such shares, if more than one, and with suc
maintenance in the meantime and under and subject to suc
conditions, etc., and limitations over (such limitations over bein
for the benefit of some one of such children or issue) as A by h
will, etc., should appoint, and in default of appointment to pa
the fund between all the children (if more than one) of th
marriage, and the issue of any children who should then be dea
leaving issue; and if but one, to such one child; the said fund
be paid to sons at twenty-one and to daughters at twenty-one
days of marriage, in case such ages or days should not take pla
until after A's death; but in case such should happen in h
lifetime, then such payment should be postponed till after his deat
It was declared that the shares of the fund and the interest there
should, subject to the power, vest in sons at twenty-one and
daughters at twenty-one or marriage, though A should be aliv
A, by will, appointed the fund to the children share and sha
alike on attaining twenty-one or marriage with consent, ar
directed that the interest should be, for their maintenance, giv
in trust to his wife until the sons entered professions or attain

nty-one, and the daughters attained twenty-one or married with sent. It was held, first—That the portions were *by the settlent* vested before the period of payment; second—That the vision *in the will* as to maintenance was of itself sufficient to t the portions. And it was said that the express provision as vesting could not qualify the previous part of the clause, and t the rules as to the vesting of portions and legacies are the ne, *i.e.*, as appears from the authority cited (*Stephens* v. *Frost* 37), 2 Y. & C. Ex. 297, at p. 302), in cases where there is a of the whole interim interest. And see *Mostyn* v. *Brunton* 66), 17 Ir. Ch. R. 153, where it was held (*inter alia*) that the e that a gift of interim interest will render vested an otherwise tingent legacy is applicable to a limitation of a money fund deed.

Trust of personalty " for all the children as tenants in common l the several issue of the bodies of all such children " to be paid twenty-one or marriage, and the interest in the meantime to be plied towards their respective maintenance. *Held*, by Lord ngdale, M.R., that the children took absolute interests at birth : *unt* v. *Mount* (1851), 13 Beav. 333; 88 R. R. 510.

" With respect to a money fund, where no time or age is pointed for the vesting of the shares, the children in general take mediate absolute interests in their portions, so as to pass them their personal representatives, although they die minors and married " : *Re Howard's Trusts* (1858), 7 Ir. Ch. R. 344, at 350.

Trusts in a marriage settlement for the trustees (on the death the survivor of husband and wife) to " transfer, assign, and ke over £10,000 to and between or amongst all and every the ld and children . . . *his, her, or their respective executors, ministrators, or assigns*, equally to be divided," etc., " if one, n to that one alone." There was a provision that the shares of h of the children as should be minors at the decease of the viving parent, were to be paid, transferred, assigned, and made r to them if sons at twenty-one, or if daughters, at twenty-one marriage, with the interim interest by way of maintenance. ere was a gift over in the event of there being no children, or if y should all happen to die before becoming " entitled." Four ldren survived their parents and attained twenty-one, and two son and a daughter) died in early infancy, living the parents, that the gift over did not arise. Romilly, M.R., said (28 Beav., p. 57) : " Here is a direction that the shares vested while nors should be paid when they attained twenty-one years; how I get over those express and distinct words of the settlement, l say that the shares of the children did not vest until they

attained twenty-one? . . . The Court will exercise considerab violence in qualifying the terms of a settlement for the purpose making the fund vest as early as possible, so as to prevent th children from being excluded; but I never yet heard that the Cou had violated or forced the terms of any settlement in order t prevent or postpone a vesting [till twenty-one or survivorship (i some reports)]; it has endeavoured to make it vest at an earli period than twenty-one, but never at a later." On appeal, Lor Cranworth, C., said (2 De G. J. & S., at p. 328): "If the senten had ended with its first member, there could be no doubt th every child at its birth obtained a vested interest, liable to b divested *pro tanto* on the birth of other children; but the argume is that this obvious construction is modified by the gift ove According to the original clause, every child at its birth becam entitled. . . . But there is a gift over in case of the death all the children before they should become 'entitled' to the respective shares. This, it was argued, shows that it could n have been intended to confer any indefeasible interest on a chi at its birth—for how could a child die before it should becom entitled, if it became absolutely entitled at the moment of its birth The whole case depends on our putting a proper interpretation the word 'entitled.' That word may, without any violence language, mean entitled in interest, or entitled in possession—th is, entitled to payment. The M.R. considered the latter to be, this case, the proper construction, and I concur with him. . . . cannot adopt the reasoning of the appellants, by which they wou fix arbitrarily on the majority of every child as the time at whi its share was to vest." It was accordingly held that the represe tatives of the infants took shares: *Jopp* v. *Wood* (1860), 28 Bea 53; 29 L. J. Ch. 406; 6 Jur. (N.S.) 620, and on app. (1865) 2 De J. & S. 323; 34 L. J. Ch. 625; 11 Jur. (N.S.) 833.

"Entitled."

Settlement of personalty for the benefit of all the children of t marriage to be paid or assigned to such children at twenty-one, being daughters, on marriage. "I take it to be reasonably cle that upon the true construction of this settlement . . . each chi would take from its birth a vested interest": *per* Turner, L.J *Currie* v. *Larkins* (1864), 4 D. J. & S. 245, at p. 255; 146 R. R. 29 but this is only a *dictum*.

In *Bardon* v. *Bardon* (1865), 16 Ir. Ch. R. 415, a sum of sto was under articles of agreement vested by a father, A, in truste on trust for A for life, and after his death as to several specifi sums thereof to transfer them respectively to his children C, N, B, E, and three others, in each case "for his (or "her") ov absolute use and benefit," proviso, that no transfer or payme should be made to the said C, N, J, B, or E, until he or s

uld attain twenty-five, and also that in case any of them should before the share to which he or she was entitled under the cles should have been transferred to him or her, the share of person so dying should accrue to the survivors. A died; then a daughter) died under twenty-five and unmarried, and at her th J and E were under twenty-five. Then E (a daughter) d under twenty-five and unmarried. The question was whether E's death under twenty-five her accrued share of B's portion t over. The M.R. held that the portions were vested, notwithding the proviso as to transfer, and some stress was laid on a ction that the dividends should be applied for maintenance. refore, though the gift over to the survivors operated to divest original portions, yet the share accrued under the survivorship se did not go over on death under twenty-five, but belonged to next-of-kin.

Context showing that shares do not vest at birth.

The context may show that the vesting is not to be at birth. In *Mostyn* v. *Mostyn* (1844), 1 Coll. 161; 66 R. R. 41, it was d that two children who died infants, and without having been rried, in their parents' lifetime, were excluded from sharing in fund. Knight-Bruce, V.-C., said (at p. 167): "The trust is the children, but to be paid at twenty-one or marriage. . . . words may or may not import a vesting on birth, according to umstances. You must look at the rest of the settlement to see ther they import mere payment, or vesting. I find, in a subsent part of the settlement, and in fact very near these words—ning almost part of the same clause—this declaration :—' That, ase there shall be no such child or children living at the time of death of the survivor ' (*i.e.*, of the parents) ' or, if such, and y shall all happen to die before their respective ages of twenty- years or days of marriage,' the fund is to go over. I think that s may be fairly taken as a sufficient indication of intention t the age of twenty-one or marriage was to be the period of ting. Therefore I think that the two children who died minors ing their parents) without having married, did not acquire ted interests." The case stood over to make the personal resentatives of the infants parties, and was re-argued on their alf, when the V.-C. said that he adhered to his opinion on the struction of the settlement.

In *Re Dennis* (1857), 6 Ir. Ch. R. 422, infant children were held to be entitled; this was by force of a gift over in case there uld be no issue living at the decease of the parents, or if there uld be issue then living, and such issue should die under twenty-, etc. It was held that either the shares did not vest till nty-one, etc., or if they did vest at birth, they were divested on th under twenty-one, etc.

Direction that shares shall not vest at birth.

Of course, if the settlement directs that the share is not to ve until the child attains twenty-one, a child who does not atta twenty-one takes no share. Thus where the trusts were for all th children, " and the same shall be a vested interest in and be paid t such children at twenty-one," a child who did not attain twenty-on took no share : *Re Colley's Trusts* (1866), L. R. 1 Eq. 496.

Where trust created by direction to pay on event personal to portionist, time of payment is time of vesting.

Where a trust of personalty is created only b a direction for payment to, or division among, th children on the happening of some event persona to themselves, the portion does not vest unless an until that event happens, even though interin interest or maintenance is given.

In *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 261, a sum of £5,0 was to be raised out of a money fund of £9,000, and to be paid t younger children at twenty-one, with interest for maintenance. any child died before its share was payable there was a gift over t the other younger children. There was only one younger chil who died an infant. *Held*, that the £5,000 was not to be raised f his representatives against the eldest son. The remarks of Lo Hardwicke in this case, taken in connection with the circumstanc before him, seem to express an opinion that the Civil Law doctri as to the immediate vesting of a legacy payable at twenty-one, etc does not apply to non-testamentary instruments. But he al remarks that there was no gift except in the direction to pa " The power of raising and paying is directed and limited by t same words. There are no words to create any vesting, exce those for raising and paying, which are at twenty-one. Supposi it had been in a covenant, and the child had died before twent one, it could never have become due "; and on this ground, a also on the force of the gift over, the decision might well be reste

In *Campbell* v. *Prescott* (1808), 15 Ves. 500, there was a tru for accumulation until the settlor's grandchildren then living, to be born, respectively attained twenty-one, and on the respectively attaining twenty-one " upon trust to pay unto su grandchildren respectively as he, she, and they should respective attain unto such age, his, her and their respective shares a proportions not only " of the fund but also of the interim intere *Held*, that a grandchild who died under twenty-one took nothing

" The question in all such cases is whether the period of divisi is postponed on account of previous interests in the fund, whi are given to other persons in the meantime, or on account of so qualification attached to the donee. In the former case, t

erred interest vests . . . on the execution of the settlement .; in the latter it is contingent"; *per* Wood, V.-C., *Re Theed's tlement* (1857), 3 K. & J. 375, at p. 379; 26 L. J. Ch. 514; R. R. 192. Accordingly, in that case, the trust being to pay wenty-one, it was held that children who did not attain twenty- took nothing.

In *Richardson* v. *Goodman* (1851), 3 Ir. Jur. 317, a policy on husband's life and a bond were settled upon trust (after the th of the wife) "to pay and apply the principal moneys, etc., ong the issue of the marriage," with a power of appointment to parents, and in default of appointment, to pay and apply the l moneys to and amongst the issue of the marriage in equal res upon their respectively attaining their respective ages of nty-one or (if daughters) days of marriage. There were four ldren, of whom two died under age and intestate in the husband's time. The wife also died in his lifetime. The power of appointnt was never exercised. The two sons, J and W, who survived husband, were still infants. *Held*, that, as the whole intent the instrument "must, *prima facie* at least, be considered as ended to be for the purpose of raising portions for the issue, to given to sons when they arrived at twenty-one, or to daughters twenty-one or marriage," and as the language was ambiguous, Court ought not to give vested interests to infants.

Gift of interim interest does not accelerate vesting.

In cases falling under this rule, a gift of the whole interim erest to, or a direction to apply the whole interim interest for intenance of, the children appears not to accelerate the vesting: *bert* v. *Parsons* (1751), 2 Ves. Sen. 261, at p. 264.

The only case where the vesting was accelerated by a gift of erest for maintenance is *Re Orme* (1850), 1 Ir. Ch. R. 175; but s case appears to have been decided as to this point on the thority of *Stephens* v. *Frost* (1837), 2 Y. & C. Ex. 302, and will es. In *Stephens* v. *Frost* the property (leasehold) was vested in stees "in trust for A till he should attain the age of twenty-one rs, and in the meantime in trust to collect the rents . . . and . apply them towards the maintenance . . . of A during his nority, and upon A attaining his age of twenty-one years upon st to assign the premises and the accumulations of rents and fits, if any, to A his executors, or administrators, for the unexed remainder of the term." It will be observed that the *corpus*, the interest only, was given to A during his minority, so that case is no authority on the point. See also *Mostyn* v. *Brunton*, *ra*, p. 517.

It is suggested in *Hubert* v. *Parsons* (1751), 2 Ves. Sen. 261, at 264, that possibly the direction for payment of the whole income maintenance might make the principal vest in a child who

survived the tenant for life but died under twenty-one, but ther is no decision on the point.

Discretion to apply interim interest for maintenance.

A mere discretionary power to the trustees of the fund to appl all or any part of the income for the maintenance of the person contingently entitled to the fund : *Barnett* v. *Blake* (1862), 2 Dr. & Sm. 117; 143 R. R. 50; or a contingent gift of interest : *Campbell* v *Prescott* (1808), 15 Ves. 500, does not vest the principal.

Contingent gift of interest.

Gift over on death before portions "payable."

Where a life interest in the settled real estate or personalty i limited to one or both of the parents, the portions cannot (in mos cases) be actually raised and paid over until the expiration o such prior interests, which is the period of distribution, when th portions become "payable" in the ordinary sense. Importan questions, therefore, arise where a child attains twenty-one o marries (or is living at other the time of vesting), and then dies during the life of a tenant for life, and the settlement contain provisions which seem to deprive such a child of its portion; *e.g* where there is a gift over of the share of a child dying befor the portion becomes "payable," "assignable," or "transferable. These, and similar expressions, may refer either to age or marriag —*i.e.*, the time of vesting, or to the time of actual payment—*i.e* the period of distribution.

"Payable," "assignable," "transferable."

In such cases, though clear and unambiguous words must hav their proper effect, it is a rule of construction that—

Payment is, in clauses divesting portions, if possible read as vesting.

> Clauses or words divesting or giving over por tions, provided by parents or persons *in loc parentis*, on the death of the portionist before th portion is payable, will, if possible, be referre to the period of vesting, and not to that o distribution.

The rule applies to portions charged on realty, as well as t shares of settled personalty.

A sum of money provided by a term in a settlement after th mother's death for daughters' portions to grow due and payable a twenty-one or marriage, and if any of them should die before the portions became due and payable, it should go to the survivin daughters. *Held*, by Lord Hardwicke, C., that a daughter wh attained twenty-one, but died in her mother's lifetime, took portion : *Emperor* v. *Rolfe* (1749), 1 Ves. Sen. 208.

"As soon as these clauses came forward, in *Emperor* v. *Rol* (1 Ves. Sen. 208), Lord Hardwicke put a just construction upo them; and he referred the word 'payable' to the time in respe of the quality of the child, distinguishing between that and the tim

n *ex necessitate* the money was to be *de facto* raised" : *per* d Loughborough, C., *Willis* v. *Willis* (1796), 3 Ves. 51, at p. 54.

"The words 'payable,' 'assignable,' or 'transferable,' have erent senses according to the different clauses of the settlement which they refer. With reference to the right or capacity of the dren, the sense is 'at twenty-one or marriage.' But then the oyment of the persons entitled for life is not to be broken in n. It is therefore provided that the right, which exists for ry other purpose, shall not be exercised to their detriment. h reference to that interest, the sense is 'not till the death of tenant for life.' But it is only with reference to that, that the ceding declaration is at all qualified; and as against every one the tenant for life, the children have a right to say it remains ualified. . . . As between themselves, the time of payment st be taken to be unaltered" : *per* Grant, M.R., *Schenck* v. *h* (1803), 9 Ves. 300, at p. 310; 7 R. R. 199.

"In settlements of this description there are two sets of clauses be considered : the clauses of gift to the children, and the uses of gift over to others upon failure of the children; and the horities require that both sets of clauses should be clearly and mbiguously expressed" (*i.e.*, in order to exclude the rule) : Leach, V.-C., *Perfect* v. *Lord Curzon* (1820), 5 Madd. 442, p. 445; 21 R. R. 331.

"Where a portion is provided for a son on attaining twenty-one, for a daughter on attaining that age or being married, and those nts happen in the lifetime of the parent, the child, though it s in the lifetime of the parent, has acquired an absolute vested erest in the portion" : *per* Shadwell, V.-C., *Fry* v. *Lord erborne* (1829), 3 Sim. 243, at p. 259; 8 L. J. (o.s.) Ch. 25; 30 R. 156.

"In cases of settlements, if there is reason to collect, however se and ambiguous the language may be, that all the children of marriage were intended to take, then, although there may be rds which go to express that those only shall take who shall be ng at the death of the parent, the Court holds that all the ldren who attained the age of twenty-one, although they died the lifetime of the parent, shall take. A gift by will differs from case of a trust declared by a settlement, because in the former re is no supposition that any persons can be intended to take ept those who are described as takers" : *per* Shadwell, V.-C., *cker* v. *Harris* (1832), 5 Sim. 538, at p. 543.

"In this case the grandfather is providing for his children and ndchildren in such a manner as throughout to place himself, h regard to the grandchildren, in the position of one who is forming a father's part, and providing . . . portions for his

several grandchildren. . . . Whereas, in the case of ordinar instruments, an express estate thereby limited cannot be enlarg except by necessary inference, yet upon instruments of this descri tion, there is an implication of law arising upon the instrume itself, subject of course to any expression to the contrary, that it the intention of any person who places himself *in loco parentis* provide portions for children or grandchildren, as the case may b at the period when those portions will be wanted, namely, up their attaining the age of twenty-one (or as is usually provided the case of daughters), upon their attaining twenty-one or marriag and that such portions shall then vest, whether the children do do not survive their parents. It is thought to be an unnatur supposition that the circumstances of such children or grandchildr predeceasing their parents should have been contemplated depriving them of the whole of the portion intended for the benefit" : *per* Wood, V.-C., *Swallow* v. *Binns* (1855), 1 K. & 417, at pp. 424, 425; 103 R. R. 154.

"The case of *Emperor* v. *Rolfe* (1749), 1 Ves. Sen. 20 originally established the strong and unrebuttable [*sic*, *sed quaer* presumption that in marriage settlements the shares of children a intended to become vested when they are wanted; that is to sa in the case of sons at twenty-one, and of daughters at twenty-o or marriage" : *per* James, V.-C., *Re Wilmott's Trusts* (186 L. R. 7 Eq. 532, at p. 537; 38 L. J. Ch. 275.

"If there be any doubt as to the meaning of the words use the Court must struggle to put such a construction upon the sett ment as will let in all the children of the marriage who attain twenty-one years, whether they did so in the lifetime of the parents or not" : *per* Hall, V.-C., *Jeyes* v. *Savage* (1875), L. 10 Ch. 555, at p. 558, n.; 44 L. J. Ch. 706, where the cases a commented on.

"There is a series of authorities which establishes that, regards marriage settlements, and also as regards post-nupti settlements containing a recital of an intention to provide for the children of a marriage, you are not as a general rule to re the instrument in such a way as to make the provision for a chi depend on surviving both parents. But it is laid down, both Sir William Grant in *Howgrave* v. *Cartier* (1814), 3 V. & B. 7 13 R. R. 142, and by Lord Cottenham in *Whatford* v. *Moo* (1836), 3 My. & Cr. 270, that if the settlement clearly a unequivocally makes the right to a provision depend on survivo ship, then the rule does not apply. What is 'clear' a 'unequivocal' is very difficult to say. What is clear to one mi might not be so to another. In the last case on the subject, *Jey* v. *Savage* (*supra*), the Court of Appeal differed from Hall, V.-

such differences of opinion must always occur in construing iguous instruments. But James, L.J., in that case cites with oval a passage from the judgment of Lord Cottenham in tford v. *Moore* (1836), 3 My. & Cr. 270, the concluding words hich are these : 'The cases upon this subject turn upon such distinctions, and are so little reconcilable, that the only reason- course is to adopt the rule, which has been generally recog- l, of leaning in favour of a construction which includes all the lren, if the instrument affords fair grounds for doing so; but ot, to give effect to the plain meaning of the words used.' I k that is a sensible rule. When you find fair ground for doing then, in marriage settlements and post-nuptial settlements aining a recital of an intention to provide for all the children particular person or particular persons, you are to lean to that truction which includes them all; but you are not to have urse to old authorities to overcome the plain meaning of the ls used" : *per* Jessel, M.R., *Day* v. *Radcliffe* (1876), 3 Ch. D. at p. 657.

'The primary Court decided that W took a vested interest on ining twenty-one, which was not contingent on his surviving parent and not defeated by his decease in the lifetime of his er. . . . A long line of decisions has brought down to us from time of Lord Hardwicke a rule of construction applicable to and ch ought to guide us on such a question as that now before us. . The rule then being that in the construction of a settlement as that before us there is a presumption that the settlor viding for his unborn children intended that according to nary practice their portions should become vested at twenty-one marriage, we have to examine and see whether there is to be nd in this settlement any clear language evidencing an intention lepart from this practice and make the right of the child con- ent upon his surviving both parents" : *per* Lord Fitzgerald, *kefield* v. *Maffet* (1885), 10 Ap. Ca. 422, at p. 434; 55 L. J. 4.

In the following cases children who attained twenty-one or ried were held to be indefeasibly entitled to portions notwith- ding a gift over on death before payment : where the portions e raisable (i) out of realty : *Emperor* v. *Rolfe* (1749), 1 Ves. 208 (due and payable); *Cholmondeley* v. *Meyrick* (1758), den. 77 (due and payable); *Willis* v. *Willis* (1796), 3 Ves. 51 yable); *Fry* v. *Lord Sherborne* (1829), 3 Sim. 243 (payable); and out of personalty : *Jeffreys* v. *Reynous* (1767), 6 Bro. P. C. 398, ed 9 Ves. 311, 3 Sim. 258 (assignable, transferable); *Schenck egh* (1804), 9 Ves. 300, the settlement is more fully stated 5 Ves. (payable, assignable, or transferable); *Mocatta* v. *Lindo* (1837),

9 Sim. 56; 47 R. R. 186 (payable, without leaving issue); *R Williams* (1849), 12 Beav. 317; 19 L. J. Ch. 46; 85 R. R. 10 (entitled to payment, assignment, or transfer); *Re Yates* (1851 21 L. J. Ch. 281; 91 R. R. 319 (entitled in possession); *Jopp* v *Wood* (1860), 28 Beav. 53; 2 De G. J. & S. 323 (entitled to the shares); *Wakefield* v. *Maffet* (1885), 10 Ap. Ca. 422 (payable) *Cobden* v. *Bagwell* (1886), 19 L. R. Ir. 150 (payable).

In *Currie* v. *Larkins* (1864), 9 L. T. (N.S.) 638; 10 Jur. (N.S.) 8 on app. 4 De G. J. & S. 245; 12 W. R. 515, there was a declaratio that the shares should become vested and transmissible interests i sons at twenty-one, in daughters at twenty-one or marriage, "whic shall first happen after the decease of the survivor of" the parents it was held that these latter words did not make it necessary for child to survive the parents in order to take a vested interest; an accordingly the representatives of a son who attained twenty-on and died in the life of the surviving parent, took a share.

When no reference to age or marriage.

As to whether the time of attaining twenty-one or of marryin will be held to be the time of indefeasible vesting in cases in whic there is no reference to that time in the settlement, see *Teynha* v. *Webb* (1751), 2 Ves. Sen. 198, at p. 207; *Remnant* v. *Hoc* (1860), 2 De G. F. & J. 396, *per* Turner, L.J., at pp. 413, 414; an *Reilly* v. *Fitzgerald* (1843), Dru. 122; 6 Ir. Eq. R. 335 (where the was only one child, and the trusts in that event made no referen to time).

Gift over if no child, or if all children die in parents' lifetime.

Where the gift over is if there is no child, or if all the childre should die in the parents' lifetime: *semble*, if the words are pla they must prevail. See *dictum* in *Schenck* v. *Legh* (1804), 9 Ve 300, at p. 312; 7 R. R. 199. There was a clause to this effect the settlement in *Currie* v. *Larkins*, *supra*, but no question aro on it.

Rule does not apply if issue of child dying before distribution take originally, or by substitution.

> The rule does not apply to cases where th original gift includes the issue of children dyin before the period of distribution, or the issue such children are substituted for their parents.

Settlement of personalty after life interests, for J, a child of former marriage, and all the children of the marriage in equ shares, and, if any should be dead leaving issue, for such issu sons at twenty-one and daughters at twenty-one or marriag maintenance until the shares should become "payable as aforesaid If J or any child should die without issue before his share shou become "due and payable," his share to be divided among t survivors and the issue of those dead when and as their origin shares should become "due and payable." If neither J nor a children nor issue should be living at the time of the decease of t

ivor of the tenants for life, or if living they all died before their es were payable, there was a gift over. J having attained nty-one died without leaving issue in the lifetime of the tenant life. *Held*, he took nothing : *Re Wilmott's Trusts* (1869), L. R. q. 532; 38 L. J. Ch. 275.

Settlement of personalty after life interests, to be transferred to ghters at twenty-one or marriage and sons at twenty-one—ntenance in the meantime. Proviso that if any such issue aforesaid should die before they should become entitled to and ally receive their portions leaving issue, such issue to take their es. Gift over if husband and wife should die without leaving issue, or being such they should all die before they should ectively become entitled to receive their portions and without ing issue. *Held*, that a son who attained twenty-one but died hout having had issue in his father's lifetime, took no share : *es* v. *Savage* (1875), L. R. 10 Ch. 555; 44 L. J. Ch. 706.

Settlement of personalty after life interests, for the children of V and the issue of such children, to be paid and transferred to children, sons at twenty-one, daughters at twenty-one or riage, and the issue of any children, whose parents should die re their shares should become payable, to be entitled to the res their parents would have been entitled to if living. *Held*, t a child who attained twenty-one but died in the lifetime of W, leaving a child, took no share : *Day* v. *Radcliffe* (1876), h. D. 654.

If issue only substituted for parents dying under twenty-one.

But probably the rule would be applied if the issue were substituted only for such parents as died before attaining twenty-one, *Mocatta* v. *Lindo* (1837), 9 Sim. 56, can probably be supported that ground : see *per* James, V.-C., *Re Wilmott's Trusts*, *supra*, p. 538.

Where children must *survive*.

In many settlements the primary gift is to children who survive or both parents, particularly by means of a trust for children ase the parents shall *leave* children surviving, and in such cases, here are no further words, only those children who survive can e. "Where it is manifest upon the face of the settlement that object of the parties is that no child shall take except in the nt of its actually surviving both the father and mother, the rt has not indulged itself in the liberty of breaking through the ress and plain words" : *per* Shadwell, V.-C., *Fry* v. *Lord rborne* (1829), 3 Sim. 243, at p. 254.

In all the following cases only such children as actually survived r parent or parents were held to be entitled : *Wingrave* v. *grave* (1717), 1 P. Wms. 401; *Gordon* v. *Raynes* (1732), 3 Wms. 134; *Balmain* v. *Shore* (1804), 9 Ves. 500, a very peculiar on partnership articles; *Hotchkin* v. *Humfrey* (1817), 2 Madd.

65; 17 R. R. 188; *Fitzgerald* v. *Field* (1826), 1 Russ. 416, a p. 430; 4 L. J. (o.s.) Ch. 171; 25 R. R. 97; *Whatford* v. *Moo* (1836), 3 My. & Cr. 270, a very special case; *Skipper* v. *Kin* (1848), 12 Beav. 29; 85 R. R. 6; *Jeffery* v. *Jeffery* (1849), 17 Sim 26; *Lloyd* v. *Cocker* (1854), 19 Beav. 140; 24 L. J. Ch. 84 105 R. R. 96; *Re Heath* (1856), 23 Beav. 193; 113 R. R. 93; *R Wollaston* (1860), 27 Beav. 642; 122 R. R. 572.

Courts lean towards reading *leave* as *have*;

and letting in all if one survives.

But even in cases where the primary gift is to children survivin the parents, the Courts have been astute in discovering in othe parts of the settlement, and particularly in gifts over, (i) an indica tion that all children who attain twenty-one, or, being daughter marry, are to take, whether any child survives the parents c not; and (ii) in cases where it is clear that one child must survive an indication that, if one child does survive, all the children wh attain twenty-one, or being daughters marry, are to take, whethe they survive the parents or not.

Leave read *have*.

The first branch of the proposition is often shortly expressed b stating that the word *leave* is read *have* by force of the gift over c otherwise.

The following are cases on the first branch of the proposition :-

A father directed that trustees should, out of the rents an profits of lands conveyed to them, if his daughter and her husban should leave at the death of the survivor any child or childre raise £200 per annum for maintenance of such child or childre until they should attain the age of twenty-one years, and then rais the sum of £5,000 and pay the same to such children in equa shares upon their attaining twenty-one, and if there should b but one child, then to such child. *Held*, that a child who attaine twenty-one, but died in the lifetime of her mother took a share Lord Thurlow, C., saying : "There is no word used to exclude the child in question, "but the word *such*, upon which it migh have been contended that the property should not vest unles the children were infants at the decease of the survivor. Thoug the words are strong and difficult to manage, the intention of th settlement is the truth and honour of the case" : *Woodcock* v *Duke of Dorset* (1792), 3 Bro. C. C. 569.

Term limited in trust after the father's decease in case he sha leave a younger child, to raise portions to be paid at twenty-one c marriage, with a provision for advancement in the father's life b his direction, and survivorship upon the death of any child befor the portion should be payable, and if there shall be no such childre or all die before the portions become payable, not to be raised *Held*, by Lord Eldon, C., that the portions vested in an onl younger child indefeasibly at twenty-one : *Powis* v. *Burdett* (1804) 9 Ves. 428; 7 R. R. 259.

settlement of personalty after life interests "in case there shall pen to be any child or children *living* who shall be of the age of nty-one years," then for such children at twenty-one as the wife ild appoint, and in default as the husband should appoint, and default "for such children at twenty-one, and in case there l be no such child, or they shall die before any of them shall in twenty-one," then over. *Held*, by Sir William Grant, M.R., the children's interests were indefeasibly vested at twenty-one: *ngrave* v. *Cartier* (1814), 3 V. & B. 79; G. Coop. 66. Similar s are: *Perfect* v. *Lord Curzon* (1820), 5 Madd. 442; *Torres* v. *nco* (1830), 1 Russ. & My. 649; 32 R. R. 308; *Swallow* v. *Binns* 5), 1 K. & J. 417; 103 R. R. 154; *Dixon* v. *Barkshire* (1865), Beav. 537; 145 R. R. 659.

The following are examples of the second branch of the protion:— If one child survives, all take.

Trusts of a portions term in case there should be any younger lren living at the time of the decease of the father, to raise ions for all and every the younger children to be paid, sons at nty-one, daughters at twenty-one or marriage, or if that event pened in the father's lifetime, at his decease. Gift over of the ion of any child becoming an eldest son, before his portion ld become payable, to the survivors, and proviso for cesser of in case all the children entitled to portions die before their ions become payable. *Held*, by Lord Eldon, C., that a child attained twenty-one, but died in the lifetime of the father, was led to a portion, some younger children having survived the er, and *semble*, if no younger child had done so: *Hope* v. *Lord len* (1801), 6 Ves. 499; 5 R. R. 364.

Trust in case at the death of survivor of husband and wife, they leave any child or children and such child or children attain ty-one, to convey to such child, if but one, and if there shall be than one child who shall live to attain twenty-one, to convey ch children who shall attain twenty-one equally at twenty-one, survivorship, and if both parents die without leaving any child, e husband. *Held*, by Sir William Grant, M.R., that though child must survive, yet if one child did so, all who attained ty-one took: *King* v. *Hake* (1804), 9 Ves. 438; 7 R. R. 266. lar cases are: *Mostyn* v. *Mostyn* (1844), 1 Coll. 161; *Gordon* v. (1849), 3 De G. & Sm. 351; 18 L. J. Ch. 228; 84 R. R. 347; e v. *Jackson* (1853), 1 Sm. & Giff. 175; 96 R. R. 366.

ettlement of personalty for E for life, and after her death ving a child or children," to transfer the funds to "all and the child and children of E and the issue of such of the ren as might be then dead" (issue to take a parent's share) lly, sons at twenty-one, daughters at twenty-one or marriage.

Held, that, although the trust could only take effect in case o child survived E, that contingency was not to be imported in the constitution of the class to take under the trust, and that son who attained twenty-one, but died before E without issue, to a vested interest: *Re Orlebar's Settlement Trusts* (1875), 20 E 711; 44 L. J. Ch. 661, approved in *Re Walker*, [1917] 1 Ch. 3 86 L. J. Ch. 196 (a case on a will); and as regards the princip followed in this last case, see the remarks of Lord Davey in *Hickli* v. *Fair*, [1899] A. C. 15, at p. 35; 68 L. J. P. C. 12 (also a ca on a will).

Recapitulation.

To recapitulate :—

In the absence of clearly-expressed directions as to vesting :—

1. Where no time is named for payment of portions :—

(i) If charged on land they vest in sons at twenty-one, daughters at twenty-one or marriage, even if interi interest is given.

(ii) If payable out of a personal fund they vest at birth.

2. Where payment of portions is postponed till an event person to the portionist :—

(i) If charged on land they do not vest unless and until t event happens, even if interim interest is given.

(ii) If payable out of a personal fund they vest at birth.

(iii) If payable out of a personal fund, only by a direction f payment on the event happening, they do not vest unle and until the event happens, even if interim interest given.

3. In all the above cases the fact of the actual raising or pa ment of the portions being postponed for the convenience of t estate has no effect on their vesting.

4. In a settlement made by a parent or person *in loco parent* the right of a child to a portion will not depend on its surviving i parent, unless the words clearly and unambiguously make the rig so dependent.

CHAPTER XXVIII.

COVENANTS.

ning of Covenant: Executed or Executory: No Special Words necessary to create Covenant: Declaration of Trust is Covenant: Covenant created by Recital: Admission of Debt by Recital is Covenant to pay: "It is hereby agreed and declared" that A shall pay is Covenant by A only: Covenants implied by Law when Deed otherwise inoperative: Assignment implying Covenant: Covenants implied by Words; by Relationship of Landlord and Tenant; by "Demise" and "Let": Express Covenants exclude Implication; Agreement under Seal for Deed to contain Covenant is Covenant: Ambiguous Words taken against Covenantor: Covenant not construed by Conduct of Parties: Proviso negativing Liability is void, secus if limiting Liability: Illegal Covenant is void; but if partly illegal, that part only void, if severable: Covenant with Penalty on non-performance: When Specific Performance decreed: Whether Penalty is Liquidated Damages: If Conditioned on one Event is Damages, if on more than one is Penalty: Recovery of Penalty is Satisfaction of Covenant: Bond or Covenant: Covenant operating as Assignment of Property: Assignment of Future Property is Covenant: Property must be Defined: All Future Property: When Assignee gets Possession he gets a Legal Title: Covenant to observe Covenants and indemnify is a Covenant of Indemnity only: Covenant with Oneself is Nugatory [but see now, section 82, Law of Property Act, 1925]: Covenant not to revoke Will: Two Covenants to settle, first is binding.

Meaning of covenant.

LTHOUGH the word "covenant," in its strict sense, means an ement under seal, that something has, or has not, already been , or shall, or shall not, hereafter be done (Shep. Touch. 160, it is sometimes, especially in agreements, applied to any ise or stipulation, whether under seal or not: *Hayne* v. *mings* (1864), 16 C. B. (N.S.) 421; 139 R. R. 559; *Brookes* v. *dale* (1877), 3 C. P. D. 52, where the word "covenant" in an ement was held to include a proviso.

Covenant is executed or executory.

A covenant may be executed, *i.e.*, that a thing " has, or has n been done "; *e.g.*, that A has not incumbered; or executory, *i.* that something " shall or shall not be done "; *e.g.*, that A w execute a further assurance.

No special words necessary to create covenant.

No particular form of words is necessary create a covenant.

" There needs not formal and orderly words as ' covenan ' promise,' and the like, to make a covenant on which to ground action of covenant, for a covenant may be had by any other word and upon any part of an agreement in writing, in what wor soever it be set down, for anything to be or not to be done, t party to or with whom the promise or agreement is made, may ha this action upon the breach of the agreement " : Shep. Touch. 16 Com. Dig. Covenant A. 1 and 2.

" Wherever the intent of the parties can be collected out of deed for doing or not doing a thing, covenant will lie " : *per* N tingham, L.C., *Hill* v. *Carr* (1676), 1 Ca. Ch. 294; *S. C. sub no Hollis* v. *Carr*, 2 Mod. 86, *sub nom. Holles* v. *Carr*, 3 Swan. 638.

" I think the only principle which these cases establish which useful to the question before us is that covenant is a matter intention, and that any words will make a covenant, wheth participial or not, if it can be clearly seen that such was t intention of the parties " : *per* Pickford, L.J., in *Westacott Hahn*, [1918] 1 K. B. 495, at p. 505; 87 L. J. K. B. 555.

" No particular technical words are necessary towards making covenant " : *per* Lord Mansfield, C.J., *Lant* v. *Norris* (1757), 1 Bu 287, at p. 290.

" It is fully established that no precise form of words is necessa to constitute a covenant. ' Any words in a deed which *show agreement* to do a thing make a covenant ' (Com. Dig. Covena A. 2); but it must be clear that they are meant to operate *as agreement*, and not merely as words of condition or qualificatio Com. Dig. Covenant, A. 3; 1 Roll. Abr. 518, pl. 3, 4 " : *per* L Denman, C.J., *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644, p. 657; 3 L. J. Ex. 360; 38 R. R. 701.

" To charge a party with a covenant, it is not necessary t there should be express words of covenant or agreement. It enough if the intention of the parties to create a covenant apparent " : *per* Tindal, C.J., *Courtney* v. *Taylor* (1843), 6 M. & 851, at p. 867; 7 Scott, N. R. 749, at p. 765; 12 L. J. C. P. 3 64 R R. 872.

" It is undoubted law that no particular word, or form words, is necessary to create a covenant; but that any words sufficient for that purpose which show an intention to be bound

deed to do or omit that which is the subject of the covenant; such words are sufficient, and some such words are necessary, make a covenant" : *per* Curiam, *Rashleigh* v. *South-Eastern Co.* (1851), 10 C. B. 612, at p. 632; 84 R. R. 725.

"I take it to be clear that any form of words which, when perly construed, with the aid of all that is legitimately admissible id in the construction of a written document, indicate an agree-it forms, when under seal, a covenant" : *per* Lord Blackburn, *ssell* v. *Watts* (1885), 10 App. Cas. 590, at p. 611; 55 L. J. 158.

"No formal words are necessary to make a covenant in such a d" (*i.e.*, conveyance on sale). "A statement of a binding ntion on the part of the vendors who execute the deed, made on face of it for the purpose of inducing the several purchasers to , is as good a covenant as could be made by the most formal ds" : *per* Kay, J., *Mackenzie* v. *Childers* (1890), 43 Ch. D. 265, . 275.

But the Court must "be satisfied that the language does not ely show that the parties contemplated that the thing might be e, but it must amount to a binding agreement upon them that thing shall be done" : *per* Parke, B., *James* v. *Cochrane* (1852), xch. 170, at p. 177; 21 L. J. Ex. 229; 86 R. R. 600.

Agreement under seal must amount to covenant.

On the other hand the parties cannot stipulate that an agree-it under seal shall not create a covenant. In *Ellison* v. *Bignold* 21), 2 J. & W. 503 (see at p. 510); 22 R. R. 203, certain parties esolved and agreed and did, by way of declaration and not of enant, agree," and it was held that they had covenanted.

"Upon condition."

Lease "upon condition that" the lessee shall do certain things; is a covenant by the lessee : Y. B. 40 Edw. 3 (1366), 5 b; ru. Dig. Tit. 32, Ch. 26, s. 6; 1 Roll. Abr. 518, pl. 5.

"I will be ready to."

"I have in my hands a writing obligatory, and I will be ready ll times to re-deliver the same writing obligatory to B." *Held*, ovenant to do so : *Walker* v. *Walker* (1636), 1 Roll. Abr. 519, 8.

"I oblige myself to pay." *Held*, a covenant to pay : *Norrices'* e (1661), Hardr. 178.

Warranty.

Conveyance in fee with clause of warranty; eviction on prior for years; the grantee can bring covenant on the warranty : *combe* v. *Rudge* (1608), Hob. 3, and further stated in *Roll* v. *orn* (1612), Hob. 20, at p. 28; *S. C. sub nom. Rudg* v. *Pincombe* 15), 1 Roll. Rep. 25; *Williamson* v. *Codrington* (1750), 1 Ves. 511. A warranty in a lease for years is a covenant : Shep. ch. 163.

Proviso.

A proviso may amount to a covenant, or it may be merely a lification of the preceding covenant. If a lessee for years

covenants to repair, provided always and it is agreed that the less shall find timber : the word " agreed " operates as a covenant find timber : if this word had been omitted it would only ha operated as a qualification of the covenant by the lessee (*sed quae* this latter proposition, see next paragraph) : *Holder* v. *Tayl* (1615), 1 Roll. Abr. 518. See Co. Litt. 203 b; Shep. Touch. 12 *Thomas* v. *Cadwallader* (1744), Willes, 496. See also *Westacott* *Hahn* (*supra*, p. 532.

" Slates being found, allowed and delivered on the premises A." *Held*, to amount to a covenant by A to deliver them : *Mucki* *stone* v. *Thomas* (1739), Willes, 146.

"Doing," etc. " Doing, fulfilling, and performing " : *Boone* v. *Eyre* (177 2 W. Bl. 1312; " doing suit to the mill " : *Vyvyan* v. *Arthur* (182 1 B. & C. 410; 1 L. J. (o.s.) K. B. 138; 25 R. R. 437. *Held*, amount to covenants.

"Yielding and paying." " Yielding and paying " rent has been held to amount to covenant to pay it; see Platt on Covenants, Ch. 2, s. 3; *Newton* *Osborn* (1653), Styl. 387; *Porter* v. *Swetnam* (1654), Styl. 40 *Hellier* v. *Casbard* (1666), 1 Sidf. 240, 266; *Harper* v. *Burgh* (167 2 Lev. 206; *S. C. sub nom. Harper* v. *Bird*, T. Jo. 102; *Webb* *Russell* (1789), 3 T. R. 393, at p. 402; 1 R. R. 725; *Iggulden* *May* (1804), 9 Ves. 325, at p. 330; 8 R. R. 623; *Vyvyan* v. *Arth* (*supra*).

"Rendering." " Rendering " rent free and clear from all manner of tax charges, and impositions whatsoever. *Held*, to amount to covenant to pay the rent free from all taxes, etc.: *Giles* v. *Hoop* (1690), Carth. 135.

"Being." Covenant by lessee " to repair and glaze the windows of t messuage and also the hedges, ditches, etc., the said farmhouse a buildings being previously put in repair and kept in repair by the lessor. *Held*, to amount to a covenant by the lessor to p into repair : *Cannock* v. *Jones* (1849), 3 Exch. 233; 18 L. J. E 204; 77 R. R. 618.

"To be paid." " To be paid." *Held*, a covenant to pay : *Bower* v. *Hodg* (1853), 13 C. B. 765; 22 L. J. C. P. 194; 93 R. R. 723.

"Declares." Where a person by deed " declares " that he will do a thing, amounts to a covenant by him to do it : *Richardson* v. *Jenki* (1853), 1 Drew. 477, at p. 483; 22 L. J. Ch. 874; 94 R. R. 746.

"Excepting." Lease of a house " excepting two rooms and free passage them." The assign of the lessee disturbed the lessor in the passag *Held*, that he was liable in an action of covenant : *Bush* v. *Cole* *Coles* (1692), Carth. 232; 12 Mod. 24; *S. C. sub. nom. Bush* v. *Cal* 1 Show. 388; *sub nom. Cole's Case*, 1 Salk. 196.

Words of exception. Covenant by lessee to plough the demised premises, except t warren, in due course of husbandry. *Held*, to imply a covena

to plough the warren : *St. Albans* v. *Ellis* (1812), 16 East, 352; R. R. 361.

In a lease of station refreshment rooms by defendant company plaintiff, it was declared to be the intention of the defendant npany that all trains passing should stop at the station, and defendant company engaged not to do any act which should e an effect contrary to that intention. *Held*, to be a covenant defendant company not to prevent trains stopping : *Rigby* v. *at Western Ry.* (1845), 14 M. & W. 811; 15 L. J. Ex. 60; 69 R. 836.

In an agreement for a lease of trade premises it was provided : t all the coals consumed and used by the plaintiff for the pose of his manufacture during the term should be bought and chased of the defendants, provided the defendants could and uld supply him with the quantity that should from time to time required by him, or to such extent as the defendants could ply; and that the defendants should charge for the same at a en price and no more; and further that the defendants should be compelled to supply more than 500 tons per week; and that case the defendants should from some substantial cause be ble to supply coal to the extent agreed upon, they should give plaintiff six months' notice of such their inability, and in such e the plaintiff should be at liberty to obtain his supply of coal, he excess beyond the quantity that the defendants could supply, n any other source. *Held*, that this amounted to a covenant by defendants to supply the plaintiff with coal to the extent of tons per week, unless prevented by some substantial cause : *od* v. *Copper Miners* (1849), 7 C. B. 906; 18 L. J. C. P. 293; R. R. 859.

An agreement that the plaintiff should receive a salary of £100 ear is an agreement to employ him for a year certain : *Emmens Elderton* (1852), 4 H. L. C. 624; 94 R. R. 288; or rather to pay wages for that time : *Aspdin* v. *Austin* (1844), 5 Q. B. 671; *ner* v. *Sawdon*, [1901] 2 K. B. 653; 70 L. J. K. B. 897.

Turner v. *Sawdon* has been doubted by McCardie, J., in *Re oel Bronze and Metal Co. and Vos*, 87 L. J. K. B. 466; [1918] . B. 315, at p. 324, where he says : " I think that the decision *Turner* v. *Sawdon & Co.* (if it be a binding authority) must confined to cases where the facts are substantially identical the facts there existing, where the Court can properly hold no obligation exists on the employer, on the just construction he contract, to find reasonable work for the servant, and where ment is by salary alone."

Conveyance in fee, with a restriction by way of use against ying on certain trades. *Held*, to amount to a covenant not to

Restriction by way of use.

carry them on : *Hodson* v. *Coppard* (1860), 29 Beav. 4; *S. C. su nom. Hodgson* v. *Coppard*, 30 L. J. Ch. 20; 131 R. R. 442.

"Subject to" payment.

But an assignment of a lease "subject to" the payment of th rent and performance of the covenants in the lease by the assigne does not imply a covenant by the assignee to indemnify the assign against the rent (*i.e.*, after the assignee had assigned over) *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644.

Stipulation negativing obligation.

A stipulation merely negativing an obligation is not a covenan Thus a clause in a settlement that trustees "should not be charg able for any money, but what they should actually receive," do not make a specialty debt of what they do receive : *Bartlett* v *Hodgson* (1785), 1 T. R. 42.

Clause introduced by participle qualifying preceding covenant.

But a clause introduced by a participle, or the words "to be, may amount only to a qualification of the covenant with which is connected.

Covenant by lessee to repair, "the lessor allowing and assignin timber for repairs." *Held*, to amount to a qualification of th covenant to repair : *Thomas* v. *Cadwallader* (1744), Willes, 496 but cf. *Mucklestone* v. *Thomas* (1739), Willes, 146; *Westacott* v *Hahn* (*supra*, p. 532).

Covenant by lessee not to assign without the lessor's consen such consent "not being arbitrarily withheld" : *Treloar* v. *Bigg* (1874), L. R. 9 Ex. 151; 43 L. J. Ex. 95; "not to be unreasonabl withheld" : *Sear* v. *House Property and Investment Society* (1880 16 Ch. D. 387; 50 L. J. Ch. 77. *Held*, that the words amounte only to a qualification of the covenant by the lessee.

Declaration of trust is a covenant.

A declaration of trust is equivalent to a covenan

Thus, though a breach of trust of itself creates only a simp contract debt : *Vernon* v. *Vawdry* (1740), 2 Atk. 119; *Cox* v *Bateman* (1750), 2 Ves. Sen. 19; a declaration of trust contained a deed, executed by the trustee, makes it a specialty : *Benson* v *Benson* (1710), 1 P. Wms. 130; *Mavor* v. *Davenport* (1828), 2 Sim 227; *Wood* v. *Hardisty* (1846), 2 Coll. 542; even if contained in deed poll : *Turner* v. *Wardle* (1834), 7 Sim. 80; but the deed mu be executed by the trustee; mere acting under it is not enoug *Richardson* v. *Jenkins* (1853), 1 Drew. 477; and it must conta a declaration of trust : a declaration that the trustee accepts t office is not sufficient : *Adey* v. *Arnold* (1852), 2 De G. M. & G. 43 95 R. R. 151; *Wynch* v. *Grant* (1854), 2 Drew. 312; 23 L. J. C 834; 100 R. R. 156; *Isaacson* v. *Harwood* (1868), L. R. 3 Ch. 22 37 L. J. Ch. 209; *Holland* v. *Holland* (1869), L. R. 4 Ch. 449; L. J. Ch. 252.

A recital may create a covenant; but if there be an express covenant to which the recital can be referred, the words of the express covenant must be taken to supersede the covenant which, in their absence, might have been implied from the recital.

A recital may create a covenant.

'Where words of recital or reference manifested a clear ntion that the parties should do certain acts, the Courts have n these inferred a covenant to do such acts": *per* Lord man, C.J., *Aspdin* v. *Austin* (1844), 5 Q. B. 671, at p. 683.

'There can be no question that a recital in a deed may amount covenant, but it must be plain upon the whole deed that it was ntended": *per* Sullivan, M.R., *Borrowes* v. *Borrowes* (1872), R. 6 Eq. 364, at p. 378.

'There is another rule that the recital of an agreement does not te a covenant where there is an express covenant to be found he witnessing part relating to the same subject-matter": *per* el, M.R., *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, at p. 359.

A recital that something is intended to be done amounts to a enant to do that thing, and a recital of a state of facts amounts covenant that that state of facts exists.

Examples.

Where the condition of a bond contained a recital that the ntiff had covenanted with the defendant that it should be lawful the defendant to cut wood for fire-bote without making waste or ing more than necessary, and the condition was to perform all enants and agreements, it was held, in an action by the plaintiff inst the defendant for waste in felling wood, that the defendant bound: *Stevinson's Case* (1587), 1 Leon. 324, pl. 457; 12 t, 182, n.

Recital in a deed poll by A that he was possessed of certain ls for a certain term of years, and that by good and lawful veyance he assigned the same to B, with divers covenants, cles, and agreements in the said deed contained which are or ht to be performed on his part; and the condition of the deed was to perform, etc. *Held*, that, unless A had that interest, condition was broken: *Severn and Clerk's Case* (1588), 1 Leon. See Rawle on Covenants, 479.

Recital in a lease of a mine, that before the sealing of the enture it was agreed that the plaintiff should have the third part he coals digged. *Held*, to amount to a covenant to render n: *Barfoot* v. *Freswell* (1676), 3 Keb. 465.

Recital in marriage articles of an agreement to levy a fine. *d*, to amount to a covenant to levy a fine: *Hollis* v. *Carr* (1676), em. Ch. 3; 2 Mod. 86; 3 Swan. 638.

Recital in marriage articles, that the defendant was to pay to

the plaintiff £1,000 for the marriage portion of the wife. *Held*, t amount to a covenant to pay that sum : *Graves* v. *White* (1680 Freem. Ch. 57.

Recital in a partnership deed, executed on the retirement one partner, of an agreement, " that the debts and credits of th retiring partner shall be received and paid by the continuin partners." *Held*, to amount to a covenant by the continuin partners to pay the debts of the retiring partner : *Saltoun* v *Houstoun* (1824), 1 Bing. 433 ; 2 L. J. (o.s.) C. P. 93 ; 25 R. R. 66

Recital in a lease of an agreement by the lessee with the less and other parties for pulling down an old mill and building anoth of larger dimensions, followed by a covenant to keep such new mil and leave it at the end of the term, in repair. *Held*, that there wa an implied covenant to build it : *Sampson* v. *Easterby* (1830), B. & C. 505 ; 6 Bing. 644 ; 33 R. R. 239.

Recital that defendant had agreed to pay off certain mortgag and debts of W, and covenant by defendant to save harmless an indemnify against the payment of the said debts. *Held*, to amou to a covenant to pay the debts as well as to indemnify : *Carr* v *Roberts* (1833), 5 B. & Ad. 78 ; 2 L. J. K. B. 183 ; 39 R. R. 405.

Recital in a mortgage, that it had been agreed between th mortgagor and mortgagee that the mortgagee should be at libert to sign judgment in an action commenced against the mortgago " but that no execution shall issue thereon until this prese security be realised." *Held*, to amount to a covenant by th mortgagee not to issue execution till the realisation of the security *Farrall* v. *Hilditch* (1859), 5 C. B. (N.S.) 840 ; 28 L. J. C. P. 22 116 R. R. 900.

In a marriage settlement there was a recital that the wife father was desirous to give his daughter as a marriage portion su sum or child's share as he might be entitled to dispose of ; and th intended husband, who had power to jointure to the amount ten per cent. on the fortune which he should receive with his wif in consideration of the marriage and of the portion agreed to paid as thereinbefore stated, appointed a jointure of £500 a yea which was also collaterally secured on other lands, not subject to th power. *Held*, that the recital amounted to an absolute covena by the father that his daughter should have on his death a share his personal estate equal to that of each of his other childre *Duckett* v. *Gordon* (1860), 11 Ir. Ch. R. 181.

Recital in a creditors' deed that the debtor had agreed to p a certain composition on his debts, followed by a release by th creditors. *Held*, to amount to a covenant to pay the compositio *Lay* v. *Mottram* (1865), 19 C. B. (N.S.) 479 ; 147 R. R. 670.

A deed of mutual covenants, executed by purchasers on purcha

ots on a building estate, and also executed by the vendors, con-
ed a recital that it was intended to be a part of all future
racts for sale of the plots that the several purchasers should
ute the deed and be bound by the stipulations contained in it.
l, that such recital was a covenant by the vendors not to sell
unsold plots on other conditions. "A statement of a binding
ntion on the part of the vendors . . . is as good a covenant
ould be made by the most formal words": *per* Kay, J.,
kenzie v. *Childers* (1889), 43 Ch. D. 265, at p. 275; 59 L. J.
188.

Recital in a separation deed that the husband and wife had
ed to live apart. *Held*, that a covenant by the wife to live
t ought to be implied: *Re Weston*, [1900] 2 Ch. 164; 69
J. Ch. 555.

Admission of debt by recital is covenant to pay.

A mere admission of a debt by a recital (even in a deed poll: *Turner* v. *Wardle* (1834), 7 Sim. 80), where the recital has no other object, implies a covenant for payment: *Brice* v. *Carre* (or *Curr*) (1662), 1 Lev. 47; 1 Keb. 155; *per* Romilly, M.R., *Marryat* v. *Marryat* (1860), 28 Beav. 224, at p. 226; 29 L. J. Ch. 665; 126 R. R. 104; *per* Lord Cairns, C., *Isaacson* v. *Harwood* (1868), L. R. 3 Ch. 225, at p. 228; 37 L. J. Ch. 209; and *per* Malins, V.-C., *Jackson* v. *N. E. Ry. Co.* (1877), 7 Ch. D. 573, at p. 583; 47 L. J. Ch. 303.

Unless made for another purpose.

But such a recital does not so operate where it is made for some
r purpose; *e.g.*, to show what is intended to be secured by the
d. Accordingly, recitals that a debt is due, in the transfer of a
tgage: *Courtney* v. *Taylor* (1843), 6 M. & Gr. 851; 12 L. J.
P. 330; 64 R. R. 872; or in an assignment for the benefit of
itors: *Iven* v. *Elwes* (1854), 3 Drew. 25; or in an assignment
the benefit of a single creditor: *Stone* v. *Van Heythuysen*
54), Kay, 721; or in a mortgage to secure the debt: *Marryat*
Marryat, *supra*; *Isaacson* v. *Harwood*, *supra*; or in a conveyance
rust to secure it: *Jackson* v. *N. E. Ry. Co.*, *supra*; were held
to turn the debt into a specialty.

In *Cheslyn* v. *Dalby* (1840), 4 Y. & C. Ex. 238; 10 L. J. Ex. Eq.
47 R. R. 384, the recital was taken to amount to a covenant
ay, although it had another object also.

If the recital be followed by an agreement under seal to execute
ortgage "including all powers, covenants, and clauses incidental
necessary thereto," the debt is a specialty: *Saunders* v.
ome (1866), L. R. 2 Eq. 573.

Where a deed of assignment contained a recital of an agreeme for the transfer of certain property "for the sum of £1,000 followed by the usual acknowledgment of the receipt of the £1,00 which, however, was not in fact paid, it was held that no covena to pay the £1,000 could be implied in the face of the acknowled ment: *Morgan's Patent Anchor Co.* v. *Morgan* (1877), 35 L. T. 81 Amphlett, B., at p. 813, said: "The question is whether, as t deed stands, a Court of law can say that there is by implication covenant to pay a certain sum of money, when the same deed sa that the money has been already paid. I do not think that it can

"It is hereby agreed and declared," followed by statement that one is to act, is a covenant by that one only.

Where, in a clause commencing "it is here agreed and declared," it is stated that a perso party to the deed, is to do a thing, the only covena is by such person.

"It appears to me that in effect the words 'it is hereby agre and declared' operate thus: they operate to show that what comprised in the clause of which these words are the commen ment, is what all parties intend and agree shall be done; a whatever you find in the clause is agreed to be done by any giv party, it is an agreement that that party is to do it; but the par who is to do the thing is the person who is alone bound to perfo that agreement": *per* Kindersley, V.-C., *Ramsden* v. *Smith* (185 2 Drew. 298, at pp. 307, 308; 23 L. J. Ch. 757; 100 R. R. 147.

"The rule is that where you have such words as 'it is here agreed and declared between and by the parties to these present that some one will do an act or make a payment, and that so one is a party to the deed, it is a covenant by him with the othe not a covenant by all of them. Anything more absurd than to h it was a covenant by all of them could not be imagined": *p* Jessel, M.R., *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, at p. 359.

Covenants are only implied where the deed would otherwise be inoperative.

The Court will imply a covenant, where t deed would be inoperative unless such covenant implied, but not otherwise.

"The doctrine [as to implied agreements] which is to collected from the cases, is involved in much difficulty. It is always possible to see what is and what is not sufficient to raise implied agreement. This, however, is a plain, intelligible, sensib and settled rule that, whereas you ought never to imply a covena against the intention of the parties, so it goes further, and y ought not to imply an agreement unless, in the fair and hon construction of the deed, it appears that it was the intention of t parties, or unless it is absolutely necessary, to imply it; and wh

said you ought not to imply a covenant unless it is necessary, must be taken to mean when it is necessary, in order to carry effect the intention of the parties, that it should be implied; that means, not the intention of the parties merely that pay-t should be made, but their intention that the deed should ate by way of agreement to pay": *per* Kindersley, V.-C., v. *Elwes* (1854), 3 Drew. 25, at p. 34.

"The parties have entered into a contract to do certain things n the assumption that certain necessary assents would first be ined; but there is no provision, express or implied, to show either of them took upon themselves the accomplishment of preliminary step. That being so, it is not competent to the rt to make a contract for the parties which they have not ight fit to make for themselves or to import a covenant which not arise by fair and necessary implication from the language have used": *per* Cockburn, C.J., *Smith* v. *Mayor, etc., of wich* (1857), 2 C. B. (N.S.) 651, at p. 669; 26 L. J. C. P. 257; R. R. 817.

"I have for a long time understood that rule" (*i.e.*, as to lying covenants) "to be that the Court has no right to imply written contract any such stipulation, unless, on considering terms of the contract in a reasonable and business manner, an lication necessarily arises that the parties must have intended the suggested stipulation should exist. It is not enough to that it would be a reasonable thing to make such an implication. must be a necessary implication in the sense that I have tioned": *per* Lord Esher, M.R., *Hamlyn* v. *Wood* [1891] 2 B. 488, at p. 491. "I agree with the rule as laid down by the ster of the Rolls, *viz.*, that the Court ought not to imply a term contract, unless there arises from the language of the contract lf, and the circumstances under which it is entered into, such inference that the parties must have intended the stipulation question, that the Court is necessarily driven to the conclusion t it must be implied. To state the rule in any wider terms ld be going, I think, beyond what is justifiable in principle": Kay, L.J., *ibid.*, at p. 494; 60 L. J. Q. B. 734.

Covenant implied from whole deed.

In the following cases on the construction of the whole deed a enant was implied.

By deed it was agreed between A and B "that A shall give £775 B for his lands, etc., the money to be paid before midsummer." *d*, that the words amounted to a covenant by B to convey the ls, etc.: *Pordage* v. *Cole* (1670), 1 Wms. Saund. 319 l (ed. 1871, 1, p. 548).

Agreement in a charter-party that "forty days shall be allowed unloading and loading again." *Held*, that a covenant not to

detain the ship more than forty days for loading must be implied *Randall* v. *Lynch* (1810), 12 East, 179; 11 R. R. 340, 727.

Covenant by a lessee that he would, at all times and seasons burning lime, supply the lessor and his tenants with lime at certain price and for certain purposes. *Held*, to imply a covena by him to burn lime at all such seasons: *Shrewsbury* v. *Gou* (1819), 2 B. & Ald. 487; 21 R. R. 367.

Covenant in a lease that the tenant should fold "his flock sheep which he should keep on the demised premises." *Hel* that this amounted to a covenant to keep a flock of sheep on t premises: *Webb* v. *Plummer* (1819), 2 B. & Ald. 746; 21 R. 479.

Covenant by plaintiff to supply 350,000 sleepers "as and wh and in such quantities as the engineer should require," and covena by defendants to pay for sleepers hereinbefore contracted to supplied. *Held*, to amount to a covenant to take the whole numb of sleepers: *Great Northern Railway* v. *Harrison* (1852), 12 C. 576; 22 L. J. C. P. 49; 92 R. R. 786.

Specification that contractor will be required to sink the we etc., to a depth of 120 feet, etc., after which the company w undertake the erection of the permanent engine and permit t pumping to be performed by it. *Held*, that there was a covena by the company to erect the engine: *Knight* v. *Gravesend, et Co.* (1857), 2 H. & N. 6; 27 L. J. Ex. 73; 115 R. R. 398.

Grant of an annuity to commence on grantor's death and char on lands of which grantor was in fact only tenant for life, covena by grantor that if annuity became in arrear annuitant mig distrain. *Held*, in D. P. (Lord St. Leonards *diss.*) that grantor estate was liable in covenant for payment of the annuity: *Mon penny* v. *Monypenny* (1861), 9 H. L. C. 114; 31 L. J. Ch. 26 131 R. R. 72.

Agreement for sale of medical practice; payment to be by mea of profits earned during four years. *Held*, to imply an agreeme by the purchaser that he would not by his wilful acts or defa prevent the receipt of earnings: *MacIntyre* v. *Belcher* (1863), C. B. (N.S.) 654; 32 L. J. C. P. 254; 135 R. R. 860.

Agreement for sale of business, the purchase-money to be pa able by instalments contingent on the amount of the profits of t business. *Held*, that, as the amount of purchase-money depend on the profits of the business, there was an implied covenant by t purchasers to carry it on: *Telegraph Despatch and Intelligence* v. *McLean* (1873), L. R. 8 Ch. 658.

Agreement by plaintiff to act as musical director of the defe dant's theatre for three years, upon certain terms as to salary, wi a provision that his name should be announced in certain new

ers and on bills and programmes. There was no express stipula- in the agreement that the defendants would employ the ntiff as conductor, but it appeared in evidence that the most ortant duty of a musical director is to conduct the orchestra. d, to imply a covenant by the defendants to employ plaintiff in capacity, and not merely to pay him a salary: *Bunning* v. c *Theatre, Ltd.* (1894), 71 L. T. 396; cf. *Turner* v. *Sawdon*, 1] 2 K. B. 653; 70 L. J. K. B. 897, but this case has been oted, *vide*, p. 535.

Agreement by wholesale dealers that for a period of four years would distribute among their customers, the retailers, by way onus, a proportion of the annual profits. *Held*, that it was an lied term that they would carry on business for the full period our years, and would not during that period do any act disabling nselves from earning profits: *Ogdens, Ltd.* v. *Nelson*, [1903] . B. 287; 72 L. J. K. B. 767; [1904] 2 K. B. 410; 73 L. J. B. 865; [1905] A. C. 109; 74 L. J. K. B. 433.

Covenant not implied from whole deed.

In the following cases on the construction of the whole deed no enant was implied.

The plaintiff covenanted with the defendant that D should for years from that date serve the defendant in the art of a surgeon ist, and attend for nine hours each day; and the defendant in sideration of the services to be done by D, covenanted with the ntiff that the defendant would during the five years, in case D uld faithfully perform his part of the agreement, particularly as he nine hours, but not otherwise, pay to D certain weekly sums. emained for some time in the defendant's service and faithfully ormed his part of the agreement, but defendant during the term nissed D. *Held*, that there was no implied covenant that the ndant would allow D to serve him during the whole of the n: *Dunn* v. *Sayles* (1844), 5 Q. B. 685.

The plaintiff conveyed two pieces of land to a railway company, ject to the performance by them of certain agreements therein ted, being to the same effect as the covenants contained in the l hereinafter stated, and one of the pieces of land was described "a slip of land then being intended to be formed into a new rse for the river Beult"; and by deed of even date the company enanted with the plaintiff to make a new bridge over the nded new cut for the use of the plaintiff within three months r the permanent rails of the railway should be laid down; and r the same should be completed, to reconvey to the plaintiff slip of land which should form the new course of the river Beult, ar as the same should be diverted; and also to fill up and level then existing course of the river Beult so far as the same uld have been diverted. *Held*, that there was no implied cove-

nant to make a new cut and divert the stream : *Rashleigh* v. *Sout Eastern Railway Co.* (1851), 10 C. B. 612; 84 R. R. 725.

Lease of coal mines. Covenant by lessees to bring to bank some of the pits of the mine (being pits from which the coal shoul not be worked by out-stroke) all manure arising in the mine. *Hel* that no covenant could be implied binding the lessees to sink a p on the land : *James* v. *Cochrane* (1853), 7 Exch. 170; 86 R. R 600; on app. 8 Exch. 556.

By deed, A and B, who were partners, assigned to the plaintif all the partnership stock, debts, and sums of money, and all oth the personal estate and effects and property of them as suc partners. At the date of the deed, A was indebted to the partne ship. *Held*, that there was no implied covenant by A to pay the plaintiffs the sums due from him to the partnership : *Aulto* v. *Atkins* (1856), 18 C. B. 249; 25 L. J. C. P. 229; 107 R. R. 27

By deed a corporation agreed with a contractor that he shou make certain works, which the corporation were empowered by A of Parliament to make, at a certain price, subject to the followin provisions, namely (*inter alia*) "that the assent of the Commi sioners of Woods and Forests shall be given to the said Mayor, etc to carry out the said works so far as the same affect the land soil of the Crown." *Held*, that no covenant was implied on t part of the corporation to obtain the assent of the Commissioner *Smith* v. *Mayor, etc., of Harwich* (1857), 2 C. B. (N.S.) 651.

A effected a policy on his own life, by the terms of which poli certain funds only, in exoneration of the shareholders, were liab to answer claims on the company. The company ceased to car on business. *Held*, in an action by the insured, that there was implied covenant by the company to continue to carry on t business : *King* v. *Accumulative Assurance Co.* (1857), 3 C. B. (N.S 151; 27 L. J. C. P. 57; 111 R. R. 588.

A deed of arrangement under which a landowner agreed th certain refuse should be allowed to go upon his land, he receivi for his own use the refuse "which may from time to time be found on the land. *Held*, that there was no covenant compelling t owner of the refuse to send it on to the land : *Sharp* v. *Waterhou* (1857), 7 El. & Bl. 816; 27 L. J. Q. B. 70; 110 R. R. 844.

Contract to carry mails, the Admiralty Commissioners agreei that they would pay out of moneys to be provided by Parliament quarterly payments. *Held*, that there was no contract by t Commissioners to employ the contractor : *Churchward* v. *R.* (186 L. R. 1 Q. B. 173; 141 R. R. 623.

The plaintiffs leased a coal-mine to the defendants at a minimu rent, to be increased in case there should be pits sunk on t estate, and the lessees covenanted to work the mine uninterrupted

ntly and regularly, according to the usual or most improved ice. *Held*, that the lessees, who worked the mine by out-e, were not bound to sink pits, though that might be the most nt way of working : *Wheatley* v. *Westminster Brymbo Coal* (1869), L. R. 9 Eq. 538; 39 L. J. Ch. 175.

greement to employ A as sole agent, at a particular place, colliery for seven years, and agreement by A to act in the ry business for no other principal at that place. *Held*, that was no implied covenant by the employer that the business d be carried on during the seven years : *Rhodes* v. *Forwood*), 1 App. Cas. 256; 47 L. J. Ex. 396.

greement to employ A as a private inquiry agent. *Held*, there was no implied warranty by A that his servants, after had left his service, would not disclose to the prejudice of s information acquired by them in the course of such service : *on* v. *Hitchcock*, [1912] 1 K. B. 535; 81 L. J. K. B. 305; and e remarks of Bowen, J., in *The Moorcock* (1889), 14 P. D. 64, 68; 58 L. J. P. 73, on the distinction between an implied nty, or covenant in law, and an express contract or express nty.

ssignment of patent, covenant by assignees to pay royalties for es sold under patent "while subsisting." *Held*, that a cove-to keep the patent on foot could not be implied : *Re Railway Electric Appliances Co.* (1888), 38 Ch. D. 597; 57 L. J. 1027.

greement by defendants to sell to plaintiffs, and agreement by tiffs to take, all the grains made by the defendants for ten . *Held*, that a covenant by defendants not by voluntary act event themselves from continuing to supply grains, could not nplied : *Hamlyn* v. *Wood*, [1891] 2 Q. B. 488; 60 L. J. . 734.

Assignment implying covenant.

o this class of case may be referred the cases in which it has held that an assignment contains an implied covenant by the nor not to do anything to prevent the assignee from having ull benefit of the assignment, or in other words, not to derogate his grant.

"sells, assigns, and transfers" to B a debt due to A from C. , that these words amounted to a covenant by A not to prevent m receiving the debt : *Deering* v. *Farrington* (1675), 1 Mod. 3 Keb. 304; Freem. K. B. 368.

ssignment of an apprentice is a good covenant by the first er with the second, that he shall serve his time with him, gh it is not an assignment by way of interest : *Caister* v. *Eccles*), 1 Ld. Raym. 683.

ssignment of all the assignor's interest in a patent medicine.

Held, to imply a covenant that he would not sell, or engage w others in selling, the same : *Seddon* v. *Senate* (1810), 13 East, 6 12 R. R. 299.

A and B as co-partners assigned to C the stock-in-trade of, a the debts due to, the partnership; at the date of the assignme a bill of exchange belonging to the partnership was payable to t order of A; afterwards he made default in transferring it to and incapacitated himself from doing so. *Held*, that there was implied covenant by A not to do anything in derogation of his o grant, and that he had therefore committed a breach of covenan *Aulton* v. *Atkins* (1856), 18 C. B. 249.

An assignment of debts, with power to sue in name of assign implies a covenant not to do anything in derogation of the assig ment, which is broken by the assignor ordering a debtor who h been taken into custody to be discharged : *Gerard* v. *Lewis* (186 L. R. 2 C. P. 305.

Covenants implied in law by words or relationship.

There are, moreover, certain covenants implied in law by t use of certain words, or by the relationship between the parties.

"A covenant in law, properly speaking, is an agreement whi the law infers or implies from the use of certain words having known legal operation in the creation of an estate; so that, af they have had their primary operation in creating the estate, t law gives them a secondary force, by implying an agreement on t part of the grantor to protect and preserve the estate so by th words already created; as, if a man by deed demise land for yea covenant lies upon the word 'demise,' which imports or make covenant in law for quiet enjoyment; or, if he grant land feoffment, covenant will lie upon the word '*dedi*'" : *per* Curia *Williams* v. *Burrell* (1845), 1 C. B. 402, at p. 429; 14 L. J. C. 98; 68 R. R. 729.

"Demise."

"*Dedi*."

The old doctrine as to the covenants arising at law by the of the words "give" and "grant" will be found discussed length by Mr. Butler, Co. Litt. 384 a, note (1); but these wor when used in a deed executed after October 1, 1845, do not im any covenant, except so far as they may do so by virtue of so statute : 8 & 9 Vict. (1845), c. 106, s. 4 (replaced by section of the Law of Property Act, 1925). The exceptions seem to be words "grant, bargain, and sell," in bargains and sales of heredi ments in Yorkshire registered under 6 Anne (1707), c. 35, ss. and 34, and 8 Geo. 2 (1735), c. 6, s. 35, which Acts are repealed the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), amen by 48 Vict. (1884), c. 4; the word "grant" in a conveyance by promoters of an undertaking under the Lands Clauses Act, 1 (8 & 9 Vict. c. 18), s. 132, which operates as express covenants title, unless limited by express covenant; and a conveyance b

"Give."

"Grant."

-stock company under 19 & 20 Vict. (1856), c. 47, s. 46, which imply the ordinary covenants for title, unless the implication xpressly negatived. The covenants "deemed to be included" ertain deeds under the Conveyancing Act, 1881, s. 7, do not by virtue of the word "give" or "grant."

New Law.

ection 7 of the Conveyancing Act, 1881, is replaced by sec- s 76 and 77 of the Law of Property Act, 1925, and the Second dule to that Act.

Relationship of landlord and tenant implies covenant for quiet enjoyment,

The mere relationship of landlord and tenant implies a covenant quiet enjoyment: Shep. Touch. 165, 167; *Spencer's Case* (1583), ep. 16 a; *Nokes's Case* (1598), 4 Rep. 80 b; *Style* v. *Hearing* 6), Cro. Jac. 73; *Iggulden* v. *May* (1804), 9 Ves. 325, at p. 330; . R. 623; *Line* v. *Stephenson* (1838), 5 Bing. N. C. 183; 7 . C. P. 263; 44 R. R. 819; *Hart* v. *Windsor* (1843), 12 M. & W. at p. 85; 13 L. J. Ex. 129; 67 R. R. 266; *Bandy* v. *Cartwright* 3), 8 Exch. 913; 22 L. J. Ch. 285; 91 R. R. 836; *Hall* v. *of London Brewery* (1862), 2 B. & S. 737; 31 L. J. Q. B. ; 127 R. R. 541; *Mostyn* v. *West Mostyn Coal and Iron Co.* 6), 1 C. P. D. 145, at p. 152; *Robinson* v. *Kilvert* (1889), 41 D. 88, at p. 96; 58 L. J. Ch. 392; *Baynes & Co.* v. *Lloyd &* s, [1895] 1 Q. B. 820, at p. 825; *Budd-Scott* v. *Daniel*, [1902] . B. 351; 71 L. J. K. B. 706; *Jones* v. *Lavington*, [1903] . B. 253; 72 L. J. K. B. 98. Probably the reason of this is originally the Courts would not recognise the tenant as having estate in the lands demised and would not reinstate him if ted, and they consequently gave him a remedy in covenant, otherwise he would have been without remedy if ejected. But covenant is for such part only of the term as shall elapse le the lessor's interest continues: *Cheiny and Langley's Case* 9), 1 Leon. 179; *Swan* v. *Stransham and Searles* (1567), Dyer, a; Moore, 74; And. 12; Benl. & Dal. 150; *Adams* v. *Gibney* 0), 6 Bing. 656; 8 L. J. (o.s.) C. P. 243; 31 R. R. 514; *Penfold bbott* (1862), 32 L. J. Q. B. 67; *Baynes & Co.* v. *Lloyd & Sons*, 5] 2 Q. B. 610; 64 L. J. Q. B. 787; and does not cover lawful rruptions by a person claiming under title paramount: *Jones Lavington, supra.*

but only for lessor's term.

"Let."

The word "let" implies a covenant for quiet enjoyment: *kham* v. *Paget, infra.*

Although *Baynes & Co.* v. *Lloyd & Sons* is not an authority any implied covenant is limited to the acts of the lessor, or ons claiming under him, the subsequent case of *Jones* v. *ington* did decide that point; and although it only purported llow *Baynes & Co.* v. *Lloyd & Sons*, and notwithstanding other sions to the contrary, it would be my duty as a Judge of first ance to follow the latest decision of the Court of Appeal, and

decide—if it were necessary to decide the point—that any impli contract did not extend to persons claiming by title paramount *per* Swinfen Eady, in *Markham* v. *Paget*, [1908] 1 Ch. 697, p. 718; 77 L. J. Ch. 451.

As to what covenants are implied where a lessee holds ov on the expiration of the term but subject to an express agreeme that the terms of the old lease shall not apply : see *Wedd* v. *Port* [1916] 2 K. B. 91; 85 L. J. K. B. 1298, and as to a tenant co tinuing in occupation on new terms, see *Cole* v. *Kelly*, [192 2 K. B. 106; 89 L. J. K. B. 819.

Where a tenant for life of certain settled freeholds in Cornw granted a lease for the period of twenty-one years to a lessee f the express purpose of an explosives magazine but entered into covenant with the lessee save for quiet enjoyment, and the less was granted a licence under the Explosives Act, 1875, on the co dition (*inter alia*) that certain prescribed distances should preserved between the magazine and other buildings and works fro certain other buildings particularly described, and this conditi was infringed owing to the operation of a third party. *He* (*inter alia*), that there was an implied obligation on the part of t lessor not to do anything which would violate the condition und which the lessee was granted his licence : *Harmer* v. *Jum* (*Nigeria*) *Tin Areas, Ltd.*, [1921] 1 Ch. 200; 90 L. J. Ch. 140.

"Demise."

The word "demise" implies further a covenant for title : *Hold* v. *Taylor* (1614), Hob. 12; *Fraser* v. *Skey* (1773), 2 Chit. 64 *Burnett* v. *Lynch* (1826), 5 B. & C. 589, at p. 609; 4 L. J. (o. K. B. 274; 29 R. R. 343; *Line* v. *Stephenson*, *supra*; and probab

"Let."

"let," or any equivalent word, has the same effect : *Hart* *Windsor*, *supra*; *Mostyn* v. *West Mostyn Coal and Iron Co.* (187 1 C. P. D. 145, at p. 152; but all these cases were discussed *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610; 64 L. J. Q. 787, by Kay, L.J., who appears to doubt whether any such covena is implied.

The covenant implied is only a covenant by the actual lesso *Smith* v. *Pocklington* (1831), 1 Cr. & Jer. 445; 35 R. R. 756, whe it was held, that on a demise by A, the legal owner, A, and an equitable owner, could not be sued in covenant.

Express covenant excludes implication.

Where a deed contains an express covenant, implication of any other covenant on the sar subject-matter can be raised.

Covenant implied by "demise" negatived by express covenant.

The implication of a covenant for quiet enjoyment from the wo "demise" is rebutted by an express covenant for quiet enjoyme even if it be restricted : *Nokes's Case* (1598), 4 Rep. 80, see t case discussed : *Procter* v. *Johnson* (1610), 1 Buls. 2; 2 Brow

. 212; Cro. Eliz. 809; Cro. Jac. 233; Yelv. 175; *Holder* v. *or* (1614), Hob. 12; *Merrill* v. *Frame* (1812), 4 Taunt. 329; *nard* v. *Forbes* (1837), 6 Ad. & El. 572; 6 L. J. K. B. 185; R. R. 564; *Line* v. *Stephenson* (1838), 4 Bing. N. C. 678; 5 . N. C. 183; 6 Sco. 447; 7 Sco. 69.

'he implication of a covenant from the word "grant" was tted by an express covenant in *Clarke* v. *Samson* (1748), 1 Sen. 100.

So of "grant."

Jo implied contract to repair arises out of the relation of land- and tenant, where the tenant holds under an express contract h provides for the very matter: *per* Lord Denman, C.J., *den* v. *Chrismas* (1847), 10 Q. B. 135, at p. 141; 16 L. J. B. 265; 74 R. R. 224.

Contract to repair.

An agreement under seal to execute a deed which ought to contain certain covenants, operates as a deed containing such covenants.

Agreement under seal for deed to contain a covenant is a covenant.

, being indebted to B, on simple contract, executed a deed reby he charged certain property with the payment of the debt, agreed to execute such a mortgage of the property, with "all ers, covenants, and clauses incidental thereto," as B should ire. *Held*, that the debt was converted into a specialty, on the nd that the mortgage would contain a covenant for the pay- t of the debt: *Saunders* v. *Milsome* (1866), L. R. 2 Eq. 573.

agreement by deed to execute a lease which should contain a nant to keep the premises in good and substantial repair, and ther usual covenants, and the lessee covenanted to accept the and execute a counterpart. *Held*, in an action by the lessor, sums due for arrears of rent and dilapidations were specialty s: *Kidd* v. *Boone* (1871), L. R. 12 Eq. 89; 40 L. J. Ch. 531.

"Ambiguous words in a covenant are to be taken most strongly against the covenantor": *per* Bayley, J., *Fowle* v. *Welsh* (1822), 1 B. & C. 29, at p. 35.

Ambiguous words taken against covenantor.

'o the same effect are *dicta*: *per* Willes, J., *Rubery* v. *Jervoise* 6), 1 T. R. 229, at p. 234; 1 R. R. 191; *per* Lord Kenyon, C., *ett* v. *Bedford* (1800), 8 T. R. 602, at p. 605; *per* Le Blanc Bayley, JJ., *Love* v. *Pares* (1810), 13 East, 80, at pp. 85, 86; *Barton* v. *Fitzgerald* (1812), 15 East, 530, at p. 546; 13 R. R. *per* Bayley, J., *Shrewsbury* v. *Gould* (1819), 2 B. & Ald. at p. 494; 21 R. R. 367; *per* Holroyd, J., *Webb* v. *Plummer* 9), 2 B. & Ald. 746, at p. 751; 21 R. R. 479; and *per* Romilly, ., *Warde* v. *Warde* (1852), 16 Beav. 103, at p. 105; 96 R. 49.

But this rule "must be qualified by the observation that a d regard must be paid to the intention of the parties as collect from the whole context of the instrument": *per* Lord Eldon, C. *Browning* v. *Wright* (1799), 2 Bos. & P. 13, at p. 22; 5 R. 521; *per* Lord Ellenborough, C.J., *Sicklemore* v. *Thistleton* (181 6 M. & S. 9, at p. 12; 18 R. R. 280.

Exception to covenant.

An exception to an absolute covenant is construed strictly.

Where a tenant in tail, with reversion in the Queen, covenant against the acts of persons except the Queen, her heirs or su cessors, *existentibus regibus vel reginis Angliae*, an eviction by patentee of the Queen was held to be a breach of the covenan *Woodroff* v. *Greenwood* (1596), Cro. Eliz. 518.

Covenant not construed by conduct of parties.

A covenant cannot be construed by the interpretation put up it by the parties: *Baynham* v. *Guy's Hospital* (1796), 3 Ves. 29 3 R. R. 96; *Eaton* v. *Lyon* (1798), 3 Ves. 690; *Moore* v. *Fol* (1801), 6 Ves. 232; 5 R. R. 270; *Iggulden* v. *May* (1804), 9 V 325; 7 East, 237; 2 Bos. & P. N. R. 449, unless it is contained an ancient document, as to which see *supra*, Chapter on Ancie Documents.

Proviso negativing liability under covenant is void but limiting it is good.

If there is a personal covenant, followed by proviso that the covenantor is not to be liable und the covenant, the proviso is repugnant and voi Co. Litt. 146 a; *Furnivall* v. *Coombes* (184 5 Man. & Gr. 736; 6 Scott, N. R. 522; 12 L. C. P. 265; 63 R. R. 455; followed in *Watling* *Lewis*, [1911] 1 Ch. 415; 80 L. J. Ch. 242; s also *Re Tewkesbury Gas Co.*, [1911] 2 Ch. 27 affirmed [1912] 1 Ch. 1; 80 L. J. Ch. 723; b where the proviso limits the personal liability und the covenant, without destroying it, the proviso valid: *Williams* v. *Hathaway* (1877), 6 Ch. D. 54 and see *Forbes* v. *Git*, [1922] 1 A. C. 256, p. 259; 91 L. J. P. C. 97. As to the effect of covenant by trustees "as such trustees but n otherwise," see *Re Robinson's Settlement*, [191 1 Ch. 717, at pp. 728-9; 81 L. J. Ch. 393.

And "no evidence could exclude personal liability in t defendants, if the written document itself makes them liable" *per* Byles, J., *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174, p. 182; 36 L. J. C. P. 94.

If there are two remedies for breach of the covenant—as,

nce, injunction and damages—a proviso that only one remedy be pursued would probably be good. "When in a generall t the law doth give two remedies the grantor may provide that grantee shall not use one of them and leave the party to the r. But where the grantee hath but one remedy then that edy cannot be barred by any proviso, for such a proviso ld be repugnant to the grant": Co. Litt. 146 a. There seems e no reason why this principle should not apply to covenants. A covenant "as executor" renders the covenantor personally e: *Farhall* v. *Farhall* (1871), L. R. 7 Ch. 123, at p. 128; 40 . Ch. 728. So a covenant "as receiver": *Burt, Boulton and ward* v. *Bull*, [1895] 1 Q. B. 276; 64 L. J. Q. B. 232, but a nant to pay out of certain assets is restricted to those assets: *thew* v. *Blackmore* (1857), 1 H. & N. 762; 26 L. J. Ex. 150; R. R.810.

Where there are two remedies.

"As executor."

"As receiver."

If a covenant is illegal, either by statute or common law, it is void; but if illegal in part only, it is only void *qua* the part that is illegal, if it can be severed.

Illegal covenants are void; if illegal in part are only void in part, if severable.

'The general rule is that where you cannot sever the illegal h the legal part of a covenant the contract is altogether void; where you can sever them, whether the illegality be created by ute or by common law, you may reject the bad part and retain good": *per* Willes, J., *Pickering* v. *Ilfracombe Railway Co.* 68), L. R. 3 C. P. 235, at p. 250; 37 L. J. C. P. 118, cited with roval by Fry, L.J., reading the judgment of the Court (Lord er, M.R., Fry and Lopes, L.JJ.), in *Re Burdett, ex p. Byrne* 88), 20 Q. B. D. 310, at p. 314; 57 L. J. Q. B. 263, by Chitty, J., *er* v. *Hedgecock* (1888), 39 Ch. D. 520, at p. 522; 57 L. J. 889; and by Bigham, J., *Royal Exchange Assurance Corpora-* v. *Sjorforsakrings Aktiebolaget Vega*, [1901] 2 K. B. 567, p. 573; 70 L. J. K. B. 874. "If a party enters into several enants, one of which cannot be enforced against him, he is not reby released from performing the others": *per* Lord Abinger, ., in *Wallis* v. *Day* (1837), 2 M. & W. 274, at pp. 280—1; . J. Ex. 92. "The fact that a restraint on trade is imposed an indefinite time does not necessarily render it unreasonable void": *per* Lord Atkinson, mentioning *Wallis* v. *Day* in *Ellistrim* v. *Ballymacelligott Co-operative Agric. and Dairy iety*, [1919] A. C. 548, at p. 583; 88 L. J. P. C. 59. ne examples of this rule are given *infra* in the Chapter on enants in Restraint of Trade.

In many cases provisions for the payment of a penalty or of a for liquidated damages if an act be omitted or done are

Covenant with penalty.

annexed to a covenant to do or not to do such act : in such cas the question arises whether the covenant to do or not to do th particular act is to be construed as a covenant to do or not to d that act, or only as a covenant that, if the act be omitted or b done as the case may be, the penalty or liquidated damages sha be paid; in other words, whether specific performance or an injun tion to enforce or prevent the doing of the act can be obtaine or only the penalty or liquidated damages can be recovered it be omitted or done. "The question always is, What is the co tract?—is it that one certain act shall be done, with a sum annexe whether by way of penalty or damages to secure the performance this very act? or is it that one of two things shall be done at th election of the party who has to perform the contract, namely, th performance of the act or the payment of the sum of money? Fry on Specific Performance (6th ed.), p. 65. The rule applicab to the question may be stated thus :—

When a covenant the observance of which is secured by a penalty must be performed specifically.

> If there be a covenant with a penalty liquidated damages to be paid on breach of th covenant, the covenant is not to be broken; but there be a covenant, with a provision that it is no to be broken unless on payment of a penalty damages, the covenant may be broken on payme of the penalty or damages.

"There are three classes of covenants : first, covenants not to particular acts, with a penalty for doing them, which are within t statute 8 & 9 Will. 3 (1696), c. 11 (which provides that damages f breach must be determined by a jury); secondly, covenants n to do an act, with liquidated damages to be paid if the act is don which are not within the statute; and thirdly, covenants that act shall not be done unless subject to a certain payment": p Bramwell, B., *Legh* v. *Lillie* (1860), 6 H. & N. 165, at p. 17 30 L. J. Ex. 25; 123 R. R. 432.

"The declaration sets out a covenant by the defendant that will not sell or carry away from the demised premises any manu etc., without the consent in writing of the plaintiff, under t increased rent of £10 for every ton so carried away. Now there a various forms in which a covenant of this sort may be expresse a man may covenant simply that he will not do such an act, or th if he does he shall pay a penalty, or that if he does any such a he shall pay liquidated damages. Had the covenant been in eith of these forms, it would have been substantially a covenant not do the act, with a subsequent covenant that if he did it he shou pay a penalty or liquidated damages. But the covenant in t

e is not in either of these forms. It is a single covenant, not covenants, that the covenantor will not remove manure, under increased rent of £10 for every ton carried away. The word nt' points not only to the injury to the covenantee, but to the efit the covenantor may derive from doing the act which is hibited. It is on that ground, amongst other reasons, that I ık that the meaning is that the covenantor may remove manure ıe chooses to pay the increased rent": *per* Wilde, B., *Legh* v. *ie* (1860), 6 H. & N. 165, at p. 173.

"The terms of the lease are, that the party will not do the act ler a penalty; therefore it is a covenant against doing the act, l a stipulation that, if he shall do it, he is to pay a particular n per acre. The general rule of equity is, that if a thing be eed upon to be done, though there is a penalty annexed to ure its performance, yet the very thing itself must be done. If nan, for instance, agree to settle an estate and execute his bond £600, as a security for the performance of his contract, he will be allowed to pay the forfeit of his bond and avoid his eement, but he will be compelled to settle the estate in specific formance of his agreement. So if a man covenant to abstain m doing a certain act, and agree that if he do it he will pay a n of money, it would seem that he will be compelled to abstain m doing that act, and, just as in the converse case, he cannot ɔt to break his engagement by paying for his violation of the ıtract. This I apprehend is the general rule of equity. It is laid down by Lord Hardwicke in *Howard* v. *Hopkyns* (1742), Atk. 371, and by Lord Thurlow in *Sloman* v. *Walter* (1784), Bro. C. C. 418; as far as relates to settlements, the rule was ablished by *Chilliner* v. *Chilliner* (1754), 2 Ves. Sen. 528, which s followed in the very imperfectly reported case of *Logan* v. *enholt* (1833), 1 Cl. & Fin. 611; 36 R. R. 215, and also in *per* v. *Bartholomew* (1823), 12 Pri. 797, and again in *Hardy Martin* (1783), 1 Cox, 26. Now from all these cases it appears t the question for the Court to ascertain is, whether the party restricted by covenant from doing the particular act, although ıe do it a payment is reserved, or whether, according to the e construction of the contract, its meaning is, that the one ty shall have a right to do the act on payment of what is eed upon as an equivalent": *per* Sugden, L.C., *French* v. *cale* (1842), 2 Dr. & War. 269, at p. 274; 59 R. R. 675.

Examples.

Specific performance decreed.

In the following cases it was held that the covenant was to performed specifically.

Covenants in restraint of trade: *Hardy* v. *Martin* (1783), 1 , 26; *Barret* v. *Blagrave* (1800), 5 Ves. 555; *Clarkson* v. *Edge*

(1863), 33 Beav. 227; 33 L. J. Ch. 443; 140 R. R. 102; *Fo* v. *Scard* (1863), 33 Beav. 327; 140 R. R. 150; *Bird* v. *Lak* (1863), 1 H. & M. 111; 136 R. R. 45; *Howard* v. *Woodwar* (1864), 34 L. J. Ch. 47; 146 R. R. 564; *Gravely* v. *Barnar* (1874), L. R. 18 Eq. 518; 43 L. J. Ch. 659; *Jones* v. *Heaven* (1877), 4 Ch. D. 636; *Weston* v. *Managers of Metropolitan Distric Asylum* (1882), 8 Q. B. D. 387; 9 Q. B. D. 404; 51 L. J. Q. B 399; *London and Yorkshire Bank* v. *Pritt* (1887), 56 L. J. Ch 987; as to building, *Coles* v. *Sims* (1854), 5 De G. M. & G. 1 23 L. J. Ch. 258; 104 R. R. 1 (affirming Kay, 56, where th case is incorrectly stated); to grant a lease, *Butler* v. *Powis* (1845) 2 Coll. 156; 70 R. R. 173; to settle land, *Nandike* v. *Wilke* (1716), Gilb. Eq. Rep. 114; *Chilliner* v. *Chilliner* (1754), 2 Ves Sen. 528; *Prebble* v. *Boghurst* (1818), 1 Swanst. 309; *Roper* v *Bartholomew* (1823), 12 Pri. 797; to leave property by will, *Loga* v. *Wienholt* (1833), 1 Cl. & Fin. 611; 7 Bl. (N.S.) 1; to pay a annuity of variable amount as part of a family arrangement *Jeudwine* v. *Agate* (1829), 3 Sim. 129; 30 R. R. 136; not t "burn" the demised premises, *French* v. *Macale* (1842), 2 Dr. & War. 269; 1 Con. & L. 459; 59 R. R. 675.

Specific performance refused.

In the following cases specific performance of a covenant, th performance of which was secured by a named sum, was no enforced.

Covenant in restraint of trade, *Sainter* v. *Ferguson* (1849), Mac. & Gor. 286; 19 L. J. Ch. 170; 84 R. R. 57; *Young* v *Chalkley* (1867), 16 L. T. 286; to renew a lease, *Magrane* v *Archbold* (1813), 1 Dow 107; 14 R. R. 15; not to plough pastur land, *Woodward* v. *Gyles* (1690), 2 Vern. 119; *Rolfe* v. *Peterso* (1772), 2 Br. P. C. 436.

Penalty or damages.

If specific performance of the covenant cannot be obtained, further question arises whether the sum to be paid for breach o the covenant is a penalty or is liquidated damages.

Difference as to amount recoverable.

Where the covenantee sues for compensation for breach of suc a covenant, (i) if the sum named is held to be a penalty he wi recover such damages, be they more or less than the amount of th penalty, as he has actually sustained, 8 & 9 Will. 3 (1696), c. 11 s. 8; but (ii) if the sum named is held to be liquidated damage he will recover that sum without reference to the damages actuall sustained, as in this case the parties have themselves assessed th damages: see *Gainsford* v. *Griffith* (1668), 1 Wms. Saund. 5 (ed. 1871, vol. 1, p. 67).

No general rule can be laid down as to whether the sum name is a penalty or liquidated damages; it can only be stated that—

Penalty or damages,

The question whether a sum named to be pai

on non-performance of a covenant is a penalty, or liquidated damages, depends on the construction of the whole deed.

question of construction.

Words are not conclusive.

The use of the words "liquidated damages" or "penalty" in cribing the nature of the payment, is not conclusive: *Kemble Farren* (1829), 6 Bing. 141; 7 L. J. (o.s.) C. P. 258; 31 R. 366; *Gerrard* v. *O'Reilly* (1843), 3 Dr. & War. 414; 61 R. 97; *Dimech* v. *Corlett* (1858), 12 Moore, P. C. C. 199; R. R. 26; *Betts* v. *Burch* (1859), 4 H. & N. 506; 28 L. J. Ex. ; 118 R. R. 580; and *per* Fry, J., *Wallis* v. *Smith* (1882), 21 D. 243, at p. 249; 52 L. J. Ch. 145; in the following cases sum was called both: "a penalty to be recovered as liquidated nages," *Davies* v. *Penton* (1827), 6 B. & C. 216; 5 L. J. (o.s.) B. 112; 30 R. R. 298; *Boys* v. *Ancell* (1839), 5 Bing. N. C. (a case on an instrument not under seal); "penalty" and quidated damages" in the same sentence, *Legge* v. *Harlock* 48), 12 Q. B. 1015; 18 L. J. Q. B. 45; 76 R. R. 461.

"Both in England and in Scotland it has been pointed out t the Court must proceed according to what is the real nature the transaction, and that the mere use of the word 'penalty' the one side, or 'damages' on the other, would not be con- sive as to the rights of the parties": *per* Halsbury, L.C., in *debank Engineering and Shipbuilding Co.* v. *Castaneda*, [1905] C. 6, at p. 9; 74 L. J. P. C. 1. For a case in which the word enalty" was not interpreted in its strict sense, but the clause which it occurred was treated as one which, in the events which l happened, assessed the damages as liquidated damages, see *stal* v. *Stevenson*, [1906] 2 K. B. 345; 75 L. J. K. B. 797.

But the Court will take all the circumstances into consideration order to ascertain the intention of the parties in deciding ether a sum payable by way of compensation for breach of a ntract is to be treated as a penalty or as liquidated damages: *e* v. *British Automobile Commercial Syndicate, Ltd.*, [1906] K. B. 425; 75 L. J. K. B. 270.

"The general principle to be deduced from that judgment" . *Clydebank Engineering and Shipbuilding Co.* v. *Castaneda*, *ra*) "seems to be this, that the criterion of whether a sum—be alled penalty or damages—is truly liquidated damages, and as h not to be interfered with by the Court, or is truly a penalty ich covers the damage if proved, but does not assess it, is be found in whether the sum stipulated for can or can not be arded as a 'genuine pre-estimate of the creditor's probable or sible interest in the due performance of the principal obliga-

tion ' " : *per* Lord Dunedin, in *Public Works Commissioner* v *Hills*, [1906] A. C. 368, at p. 375; 75 L. J. P. C. 69.

"As and for liquidated damages and not as a penalty," se *Webster* v. *Bosanquet*, [1912] A. C. 394; 81 L. J. P. C. 205.

It may, however, be laid down as a rule that—

If sum conditioned on one event it is damages; if on more than one, it is penalty.

> "It is the law that where payment is con ditioned on one event, the payment is in the natur of liquidated damages, but where it is conditione on more than one event, it is in the nature of penalty " : *per* A. L. Smith, L.J., *Strickland* v *Williams*, [1899] 1 Q. B. 382, at p. 384; 68 L. J Q. B. 241.

"When a single lump sum is made payable by way of com pensation on the occurrence of one or more or all of several events some of which may occasion serious and others but trifling damage the presumption is that the parties intended the sum to be pena and subject to modification. . . . Where the payments are mad proportionate to the extent to which the " covenantors "may fai to implement their obligations and they are to bear interest fron the date of the failure," they ought not "to be regarded a penalties " : *per* Lord Watson, *Lord Elphinstone* v. *Monklan Iron and Coal Co.* (1886), 11 Ap. Ca. 332, at p. 342.

Sir George Jessel, M.R., was inclined to confine this rule t cases where one of the acts to be done was the payment of a sun of money, less than the stipulated penalty: see his judgment i *Wallis* v. *Smith* (1882), 21 Ch. D. 243, at p. 256; 52 L. J. Ch 145; but, notwithstanding his judgment in that case, the rule i not so confined: see *per* Lord Esher, M.R., *Willson* v. *Love* [1896] 1 Q. B. 626, at p. 630; 65 L. J. Q. B. 474.

"I think *Elphinstone's Case*" (*supra*), "or rather the *dict* in it, do go this length, that if there are various breaches t which one indiscriminate sum to be paid in breach is applied, the the strength of the chain must be taken at its weakest link. I you can clearly see that the loss on one particular breach coul never amount to the stipulated sum, then you may come to th conclusion that the sum is a penalty. But further than this i does not go " : *per* Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co., Ltd.*, [1915] A. C. 79, a p. 89, in which case *Willson* v. *Love*, *supra*, is distinguished.

Examples.

Where sum held to be damages;

In the following cases the stated sum was held to be liquidate damages: *Lowe* v. *Peers* (1768), 4 Burr. 2225; *Rolfe* v. *Peterso* (1772), 2 Br. P. C. 436; *Fletcher* v. *Dyche* (1787), 2 T. R. 32

L. R. 414; *Reilly* v. *Jones* (1823), 1 Bing. 302; 1 L. J. (o.s.) P. 105; 25 R. R. 640; 8 Moore, 244; *Leighton* v. *Wales* (1838), M. & W. 545; *Green* v. *Price* (1845), 13 M. & W. 695; *S. C. nom. Price* v. *Green* (1847), 16 M. & W. 346; 16 L. J. Ex. ; 73 R. R. 522; *Galsworthy* v. *Strutt* (1848), 1 Exch. 659; L. J. Ex. 226; 74 R. R. 812; *Sainter* v. *Ferguson* (1849), B. 716; 18 L. J. C. P. 217; 78 R. R. 804; *Atkyns* v. *Kinnier* 50), 4 Exch. 776; 19 L. J. Ex. 132; 80 R. R. 767; *Reynolds Bridge* (1856), 6 El. & Bl. 528; 26 L. J. Q. B. 12; 106 R. R. ; *Mercer* v. *Irving* (1858), El. Bl. & El. 563; 27 L. J. Q. B. ; 113 R. R. 784; *Sparrow* v. *Paris* (1862), 7 H. & N. 594; L. J. Ex. 137; 126 R. R. 573; *Crux* v. *Aldred* (1866), 14 R. 656; *Hinton* v. *Sparkes* (1868), L. R. 3 C. P. 161; 37 J. C. P. 81; *Lea* v. *Whitaker* (1872), L. R. 8 C. P. 70; *Wallis Smith, supra*; *Mexborough* v. *Wood* (1882), 47 L. T. 516; *ton* v. *Bennett* (1884), 51 L. T. 70; *Strickland* v. *Williams, ra*; *Webster* v. *Bosanquet, supra*, p. 556.

In the following cases the stated sum was held to be a penalty: *rdy* v. *Martin* (1783), 1 Br. C. C. 419, n.; 1 Cox, 26; see the uments of Lord Eldon, C.J., 2 Bos. & P., at p. 352; *Sloman* v. *lter* (1784), 1 Br. C. C. 418; *Astley* v. *Weldon* (1801), 2 Bos. P. 346; 5 R. R. 618; *Smith* v. *Dickenson* (1804), 3 Bos. & P. ; *Harrison* v. *Wright* (1811), 13 East, 343; 12 R. R. 369; *vies* v. *Penton* (1827), 6 B. & C. 216; 5 L. J. K. B. 112; 30 R. 298; *Kemble* v. *Farren, supra*, p. 555; *Charrington* v. *Laing* 29), 6 Bing. 242; *Boys* v. *Ancell* (1839), 7 Scott, 364; 5 Bing. C. 390; *Horner* v. *Flintoff* (1842), 9 M. & W. 678; *Reindel* v. *ell* (1858), 4 C. B. (N.S.) 97; *Betts* v. *Burch* (1859), 4 H. & N. ; *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107; 43 L. J. C. P. ; *Re Newman, ex p. Capper* (1876), 4 Ch. D. 724; 46 L. J. Bk. *Browne* v. *Phillips* (1882), 10 L. R. Ir. 212; *Dickson* v. *Lough* 86), 18 L. R. Ir. 518. and held to be penalty.

If the penalty is recovered as liquidated damages, the recovery of the penalty is a satisfaction of the whole covenant. Recovery of penalty is satisfaction of covenant.

"There is a difference between covenants in general and cove- ts secured by a penalty or forfeiture. In the latter case the igee has his election; he may either bring an action of debt for penalty and recover the penalty (after which recovery of the alty he cannot resort to the covenant, because the penalty is to a satisfaction for the whole); or if he does not choose to go upon penalty he may proceed upon the covenant and recover more

or less than the penalty *toties quoties*" : *per* Lord Mansfield, C.J. *Lowe* v. *Peers* (1768), 4 Burr. 2225, at p. 2228.

Covenant not to practise as a surgeon under a penalty of £500 The plaintiff recovered the £500, and was held not entitled to a injunction : *Sainter* v. *Ferguson* (1849), 1 Mac. & G. 286; *Carne* v. *Nesbitt* (1862), 7 H. & N. 778; 31 L. J. Ex. 275; 126 R. R 699; *Howard* v. *Woodward* (1864), 34 L. J. Ch. 47; 146 R. R 564; *Young* v. *Chalkley* (1867), 16 L. T. 286; *General Acciden Assurance Corporation* v. *Noel*, [1902] 1 K. B. 377; 71 L. J K. B. 236.

A vendor and purchaser entered into mutual covenants pro hibiting building on both such parts of the land as were and wer not sold, except in a certain specified manner. In the event o breach of all or any or either of the covenants contained in th agreement for sale a sum of £100 was to be paid "as and fo liquidated damages." *Held* (*inter alia*), that the interference o the Court by way of interlocutory injunction was not excluded b the clause as to liquidated damages : *Coles* v. *Sims* (1854), De G. M. & G. 1; 23 L. J. Ch. 258; 104 R. R. 1.

Under bond no more than penalty recoverable.

"Of course it makes no real difference whether the case is on of a bond or a covenant. You can recover under the bond onl the actual damages sustained; though if the amount of damage exceeds the amount of the penalty, you can recover no more tha the penalty" : *per* Jessel, M.R., *Palmer* v. *Locke* (1880), 1 Ch. D. 294, at p. 297; 50 L. J. Ch. 113.

Covenant operating as assignment of present property.

A covenant that property shall as from the dat of the deed belong to another operates in equity a a conveyance.

Thus a covenant "that my horse is yours" : Shep. Touch 162; Plowd. 308 *Arg.*; a covenant to stand seised, before th Statute of Uses; a covenant that you "shall have my land fo five years" : Shep. Touch. 161; are equitable conveyances.

"A contract for valuable consideration by which it is agreed t make a present transfer of property passes at once the beneficia interest, provided the contract is one of which a Court of Equit will decree specific performance" : *per* Lord Westbury, C *Holroyd* v. *Marshall* (1860-2), 10 H. L. C. 191, at p. 209; 33 L. J Ch. 193; 138 R. R. 108. "The doctrines relating to specif performance do not, I think, afford a test or a measure of th rights created" : *per* Lord Macnaghten, *Tailby* v. *Official Receive* (1888), 13 Ap. Ca. 523, at p. 548; 58 L. J. Q. B. 75.

The above *dictum* of Lord Westbury has been considered i the recent case of *Re Wait*, 96 L. J. Ch. 179; [1927] 1 Ch. 60

ere at p. 622 Lord Hanworth, M.R., says: "Lord Macnaghten cts the test apparently suggested—if not actually intended—Lord Westbury in *Holroyd* v. *Marshall*: 'Would a Court of uity decree specific performance,' as a measure of the rights the parties or as essential to cases of equitable assignment or cific lien, but he adds the important qualification: 'where hing remains to be done in order to define the rights of the ties, but the Court is merely asked to protect rights completely ned as between the parties to the contract, or to give effect such rights either by granting an injunction or by appointing receiver.' So even if the test of the right to specific permance is rejected, there remains the requisite that the rights st be completely defined as between the parties to the contract to 'the thing' in respect of which the right of one is to enforced against the other." And as to the scope of Lord stbury's *dictum*, even if accepted, see the remarks of Atkin, J., at p. 637.

But a mere charge in favour of a volunteer on a reversionary erest in stock standing in the name of a trustee (not specifically ntioned) does not create a perfect and complete equitable arge, but depends only on contract: *Re Lucan* (1890), 45 Ch. D.); 60 L. J. Ch. 40.

Assignment of future property operating as covenant.

On the other hand, an attempted assignment of property of ich the assignor is not the present owner cannot take effect by y of present conveyance, but operates as a contract to convey property when the assignor shall have become owner of it, and en that happens as an equitable assignment; but it is only forceable if given for value: *Meek* v. *Kettlewell* (1842), 1 Hare, 4; 1 Phil. 342; *Re Ellenborough*, [1903] 1 Ch. 697; 72 L. J. . 218. See also *Glegg* v. *Bromley*, [1912] 3 K. B. 474, at . 486, 491; 81 L. J. K. B. 1081.

Equitable assignment.

"The law as to equitable assignment, as stated by Lord uro in *Rodick* v. *Gandell* (*a*), is this: 'The extent of the principle be deduced is that an agreement between a debtor and a ditor that the debt owing shall be paid out of a specific fund ning to the debtor, or an order given by a debtor to his creditor on a person owing money or holding funds belonging to the er of the order, directing such person to pay such funds to creditor, will create a valid equitable charge upon such fund, other words, will operate as an equitable assignment of the ts or fund to which the order refers.' An agreement for uable consideration that a fund shall be applied in a particular y may found an injunction to restrain its application in another

(*a*) (1851-2), 1 De G. M. & G. 763; 91 R. R. 282.

way. But if there be nothing more, such a stipulation will not amount to an equitable assignment" : *per* Lord Wrenbury in *Palmer* v. *Carey*, [1926] A. C. 703, at p. 706; 95 L. J. P. C. 146.

Charge of an annuity on a benefice and covenant that if covenantor should be preferred to another benefice, he would charge it with the annuity, and that in the meantime it should stand charged therewith. The charge was at the date of the deed legal. The covenantor was preferred to another benefice, and after such preferment, but before any legal charge was created thereon, charges on benefices were prohibited. *Held*, by Lord Cottenham, C., that there was an equitable charge independently of the covenant to execute a legal charge: *Metcalfe* v. *Archbishop of York* (1836), 1 My. & Cr. 547; 6 L. J. Ch. 65; 43 R. R. 257.

In *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342, where there was an assignment by way of security to a creditor of chattels which might be afterwards brought on to the premises, Jessel, M.R., said (at p. 351): "That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value, *e.g.*, in his marriage settlement, to settle all such real estate as his father shall leave him by will, or purport actually to convey by the deed all such real estate, the effect is the same. It is a contract for value which will bind the property, if the father leaves any property to the son": *S. C.*, 51 L. J. Ch. 14. "Sir George Jessel, M.R., in giving his judgment carefully guarded himself against saying that what was decided in that case (*b*) would apply to the case of a marriage settlement containing a covenant to settle after-acquired property": *per* Stirling, L.J., in *Re Reis, ex p. Clough*, [1904] 2 K. B. 769, at p. 780; 73 L. J. K. B. 929.

In *Smith* v. *Lucas* (1881), 18 Ch. D. 531, an infant woman by a covenant contained in an ante-nuptial settlement covenanted that she would, on attaining twenty-one, settle her after-acquired property and convey the same to the trustees of the settlement upon trust for herself for life for her separate use without power of anticipation, and after her death, for the husband till bankruptcy or alienation with remainder to the issue of the marriage. *Held*, that the covenant being for her benefit was voidable only and not void, and until avoidance by the covenantor attached to all property coming to her during her coverture for her separate use without a restraint on anticipation, but that, by electing to con

(*b*) *I.e.*, *Collyer* v. *Isaacs*, *supra*.

the covenant on attaining twenty-one, the covenantor thereby bound such separate property as she was entitled to at the of such confirmation, and not that to which she might subsetly become entitled during coverture. But by section 1, ection 4 of the Married Women's Property Act, 1882, the acts of a married woman were extended to cover not only her present, but also all her future separate property, and this ection, together with sub-section 3 of that Act, were replaced ection 1 of the Married Women's Property Act, 1893. The iples stated in *Smith* v. *Lucas* and *Collyer* v. *Isaacs* (*supra*) subsequently applied in *Pullan* v. *Koe*, [1913] 1 Ch. 9; 82 . Ch. 37.

Right of indemnity.

right of indemnity is assignable and when assigned to the ipal creditor can be enforced by him although the assignor paid, and can pay, nothing: *British Union and National Insur- Co.* v. *Rawson*, [1916] 2 Ch. 476; 85 L. J. Ch. 769.

Chose in action.

deed assigning the benefit of a judgment for possession of and costs, the costs having been duly taxed, but the amount of not having been entered on the record, and no consideration ng been made by the assignee. *Held*, to operate as a valid assignment of a present debt: *Hambleton* v. *Brown*, [1917] . B. 93; 86 L. J. K. B. 1223.

Future property must be defined.

n an attempted assignment of future property, the property t be defined. The following properties have been held to be ciently defined: all machinery which shall be placed in the mill, ddition to or substitution for the original machinery: *Holroyd Iarshall* (*supra*), p. 558; stock-in-trade which shall be brought the premises in addition to or substitution for the present k-in-trade: *Lazarus* v. *Andrade* (1880), 5 C. P. D. 318; 49 . C. P. 847; crops which at any time should be in or about the e or any other premises: *Clements* v. *Matthews* (1883), 11 . D. 808; 52 L. J. Q. B. 772; all moneys to which he then was, night become, entitled under any will: *Re Clarke* (1887), 36 D. 348; 56 L. J. Ch. 981; all book debts which might become and owing: *Tailby* v. *Official Receiver* (1888), 13 App. Cas. any property to which he should become entitled by purchase: *Turcan* (1888), 40 Ch. D. 5; "all real and personal property ept business assets) to which A and B or either of them is now nall become entitled in reversion or otherwise": *Re Reis, ex p. gh*, [1904] 2 K. B. 769; 73 L. J. K. B. 929; *sub nom. Clough amuel*, [1905] A. C. 442; 74 L. J. K. B. 918; overruling *Ex p. ind* (1873), L. R. 17 Eq. 115; and where a covenant includes re property of all descriptions, the covenant, if it is too wide (as hich there has been no decision, but see *per* Lord Macnaghten *ailby* v. *Official Receiver* (*supra*), at p. 544, and *Re Reis, ex p.*

Whether an assignment of all future property is valid.

Clough (*supra*)), can be severed : *Clements* v. *Matthews* (*supra*) *Re Clarke* (*supra*). See also *Re Wait*, [1927] 1 Ch. 606; 9 L. J. Ch. 179.

In *Re Lind*, [1915] 2 Ch. 345; 84 L. J. Ch. 884, L, being on of his mother's next-of-kin, and as such presumptively entitled t a certain share in her personal estate, assigned by way of mortgag his expectant share of such property, first, to the N Society, an some years after to A, subject to the prior assignment. Som months after the second assignment the mortgagor was adjudicate bankrupt, receiving his discharge in 1910. Neither of the mort gagees proved in his bankruptcy. In 1911 the mortgagor assigne his expectant share to the I Syndicate. On his mother's death i 1914 the share fell into possession. *Held* by the Court of Appe (affirming Warrington, J.), that the two prior assignments, notwith standing the bankruptcy of the mortgagor, remained in force an had the effect of transferring his share on his mother's death an did not merely impose upon him a personal liability which coul be affected by his bankruptcy.

In *Re Dent, ex p. the trustee*, [1922] W. N. 273, it was (*int alia*) decided that in a contract to assign future property t assignees who at the time the property was acquired were n ascertained nor could be ascertained until the execution of settlement provided for by such contract, the Court could n assume a complete transfer in equity at the time of such acquisitio *Re Lind* (*supra*), distinguished.

If assignee gets possession of future property he gets legal title.

An assignment of after-acquired property, of which the assign obtains possession when it comes into existence, operates as a assignment at law and not merely in equity.

" At law an assignment of a thing which has no existence, actu or potential, at the time of the execution of the deed is altogeth void. But where future property is assigned, and after it com into existence possession is either delivered by the assignor or allowed by him to be taken by the assignee—in either case the would be the *novus actus interveniens* of the maxim of Lord Bacc upon which Lord Campbell rested his decree, and the proper would pass " : *per* Lord Chelmsford, *Holroyd* v. *Marshall* (186 10 H. L. C. 191, at p. 216.

By a building agreement it was agreed that all building a other materials brought by the builder upon the land shou whether affixed to the property or not, become the property of t landlord. *Held*, that bricks brought on to the land belonged the landlord. " Down to the time when the building materi were brought upon the landlord's premises there was no contr relating to any specific goods at all, nor anything which could subject to a decree for specific performance. The contract v

to apply to goods when brought upon the premises, and until happened there was no right or interest in equity in any goods . Upon the other hand, the moment the goods were brought the premises the property in them passed at law, and nothing eft upon which any equity as distinct from law could attach. urther performance of the contract was necessary, nor could nforced. The builder's agreement accordingly was at no time quitable assignment of anything, but a mere legal contract upon the happening of a particular event the property in law d pass in certain chattels which that event itself would ify without the necessity of any further act on the part of ody, and which could not be identified before" : *per* Bowen, *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436, at p. 441; 53 . Q. B. 192; *Re Weibking, ex p. Ward*, [1902] 1 K. B. 713; . J. K. B. 389; *Hart* v. *Porthgain Harbour Co., Ltd.*, [1903] . 690; 72 L. J. Ch. 426; but where a similar contract provided "all plant, etc., brought on the ground by the contractor shall be considered to be the property of the landlord." , that the property remained in the contractor : *Re Keen and n, ex p. Collins*, [1902] 1 K. B. 555; 71 L. J. K. B. 487.

By an agreement in writing a manufacturer agreed that certain nces made by his agent should be "covered and secured by stock of goods which shall be in his hands." *Held*, by ing, J., that when the goods had come into the hands of the it there was an agreement coupled with possession which ted a legal and not an equitable right to the goods : *Morris* v. *bbel-Flipo*, [1892] 2 Ch. 352; 61 L. J. Ch. 518.

A covenant not to sue on an obligation may operate as a release or defeasance of the obligation. Covenant operating as release.

But such a covenant must be for ever and must extend to all obligors, if more than one, otherwise it only gives a right ction on the covenant : Shep. Touch. 163; *Ayliff* v. *Scrimshire* 8), Holt, 619; *sub nom. Ailoffe* v. *Scrimshire*, Carth. 63; *Lacy Kinnaston* (1700), Holt, 178; 1 Ld. Raym. 688; *Gibbons* v. *illon* (1849), 4 C. B. 483; 19 L. J. C. P. 74; 79 R. R. 593; *on* v. *Braddyll* (1854), 9 Exch. 718; 23 L. J. Ex. 227; 96 R. 938.

"It is a maxim in law so to judge of contracts as to prevent ultiplicity of actions; therefore this must be taken to be a ender, in order to prevent two actions instead of one. . . . it is on that ground, that the Courts have construed express ls of covenant into a release. As supposing the obligee of a

bond covenanted that he would not sue on it, the Courts say th shall operate as a release; for if it operated only as a covena it would produce two actions" : *per* Buller, J., in *Smith* v. *Map back* (1786), 1 T. R. 441, at p. 446.

Covenant to observe covenants and indemnify is covenant for indemnity only.

> A covenant to observe covenants and indemnify the covenantee in respect thereof is o of indemnity only.

A covenant contained in a conveyance, or assignment of a lea to observe restrictive covenants contained in a prior conveyance the land, or the covenants on the lessee's part contained in t lease, and to indemnify the grantor, or assignor, against su covenants is merely for the purpose of indemnifying the grantor assignor, and does not enable him to sue the grantee or les unless he is required to keep such covenants by his grantor or t lessor : *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173; L. J. Ch. 612; *Harris* v. *Boots Cash Chemists, Ltd.*, [1904] 2 C 376; 73 L. J. Ch. 708. See *Reckitt* v. *Cody*, [1920] 2 Ch. 45 90 L. J. Ch. 27 (in connection with freeholds).

Inasmuch as the covenantee must sue and the covenantor sued—

Covenant with oneself is nugatory.

> No person can sue on a covenant made himself, either alone or jointly with others, wi himself, either alone or jointly with others.

See *Mainwaring* v. *Newman* (1800), 2 Bos. & P. 120; 5 R. R. 5 "There is no principle by which a man can be at the same ti plaintiff and defendant" : *per* Best, C.J., *Neale* v. *Turton* (1827) Bing. 149, at p. 151; 5 L. J. (o.s.) C. P. 133; 29 R. R. 531; *Fau ner* v. *Lowe* (1848), 2 Exch. 595; 76 R. R. 697; *Boyce* v. *Edbroo* [1903] 1 Ch. 836; 72 L. J. Ch. 547. A man covenanted with hi self and other persons who with him were partners in the sa business, to pay a debt due from himself to the said business. then died. In an action brought against his executors on a pol of insurance, Lord Ellenborough, C.J., said : "Upon this deed action could have been maintained in a Court of law against testator himself while living, or against his executors after decease, even if all the executors had been strangers to the partn ship; and therefore the deed upon which the defendants rely, d not show any debt at law" : *De Tastet* v. *Shaw* (1818), 1 B. & A 664, at p. 669; followed in *Ellis* v. *Kerr*, [1910] 1 Ch. 529; L. J. Ch. 291; *Napier* v. *Williams*, [1911] 1 Ch. 361; 80 L. J. 298. But it is said that after the death of him, who is b

nantor and covenantee, the covenant can be sued on by or ist the survivors : *Rose* v. *Poulton* (1831), 2 B. & Ad. 822; J. K. B. 5; 36 R. R. 761.

n *Ellis* v. *Kerr* (*supra*), Warrington, J., pointed out that in v. *Poulton* (*supra*), the obligation sought to be enforced by urviving covenantees was the separate obligation of one of the covenantors, and that even if the deceased covenantor-nantee had been alive he would not have been a party on both of the record : *Ellis* v. *Kerr*, [1910] 1 Ch. 529, at p. 539.

Covenant with person not a party to deed.

'he distinction between a covenant with a person not a party to deed, contained in a deed *inter partes*, and a covenant con-d in a deed not *inter partes*, and the cases on such distinction, the statutory limitation thereof, have been already referred to *a*, Chapter on the Form and Execution of Deeds.

Covenant not to revoke will.

covenant not to revoke a will is not void as being in restraint narriage : *Robinson* v. *Ommaney* (1883), 23 Ch. D. 285; 52 . Ch. 440.

Two covenants to settle, first taken.

'wo ante-nuptial settlements having been executed each con-ing a covenant for settlement of the wife's after-acquired erty, but upon dissimilar trusts, it was held, in the absence evidence of reasons for making the second settlement, and out deciding whether the first settlement could have been super-d by the second, that it was not in fact superseded : *Re Gundry*, 98] 2 Ch. 504; 67 L. J. Ch. 641.

New Law.

Section 82 of the Law of Property Act, 1925, enacts :—

(1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.

(2) This section applies to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the Court made before such commencement.

nd see also section 68 of the Settled Land Act, 1925, as to enants enforceable by the trustees of a settlement against the nt for life when the latter is also one of the trustees.

As to covenants by the donee of a testamentary power of ointment, see p. 57, note (*a*), *supra*.

CHAPTER XXIX.

COVENANTS WHETHER JOINT OR SEVERAL.

Liability, under Covenant, whether Joint or Several : Covenants Partners : Liability under Covenants implied in Law : Ben of Covenant, whether Joint or Several : Where one of Seve Covenantees has no Beneficial Interest.

The liability on covenants may be joint or several or both, and the benefit of covenants may enure jointly or severally.

If there are two or more covenantors, they may bind themsel jointly, or severally, or both jointly and severally; in other wor the liability on the covenant may be either joint, or several, or b joint and several. And if there are two or more covenantees, covenant may be entered into with them jointly, or severally, both jointly and severally; but in this case, however the coven may be framed, it cannot enure to the benefit of the covenant both jointly and severally.

If words are clear liability is determined by words ; if ambiguous, by interest of the covenantors.

Where the words of a covenant by several clear and unambiguous, the question whether t liability on the covenant is joint, several, or jo and several, is to be determined solely by the word but where the words are ambiguous, the liability v depend on the interests of the covenantors and oth circumstances.

"I take it to be clear that where several persons covenant w another in terms which import without ambiguity a joint not a several obligation, the covenant must be held to be a jo one. Where the terms are ambiguous and may import eithe joint or a several obligation, you may no doubt look at the ot parts of the deed, the interests of the covenantors and indeed other circumstances appearing on the face of the instrument wh will aid in the determination of the intention of the parties" : Lord Herschell, *White* v. *Tyndall* (1888), 13 Ap. Ca. 263, p. 276; 57 L. J. P. C. 114.

Liability joint, under express words.

In the following cases the express words were held to creat joint liability.

oint covenant given by continuing partners to a retiring ner, for indemnity: *Sumner* v. *Powell* (1816), 2 Mer. 30; 16 R. 136; on app., 1 Turn. & Russ. 423; or to pay specified to him: *Wilmer* v. *Curry* (1848), 2 De G. & Sm. 347; 79 R. 240; lease to C, containing covenants by C and D to repair, *Copland* v. *Laporte* (1835), 3 A. & E. 517; 42 R. R. 455; to partners of a house in which they carried on their business, aining joint covenants by them: *Clarke* v. *Bickers* (1845), im. 639; 65 R. R. 657; lease to "G and A, their executors, " habendum "to G and A, their executors, etc., as tenants in mon and not as joint tenants" at a rent, covenants by G and for themselves, their executors, etc., that they the said G and some or one of them their executors, etc." *Held*, to be joint nants only, and that the executors of G, who predeceased A, not liable thereon: *White* v. *Tyndall*, *supra*, p. 566.

Liability several, under express words.

In the following cases the express words were held to create a ral liability.

"*Conveniunt separatim*": *Mathewson's Case* (1596), 5 Rep. b. Where several covenantors covenant, each as to his own and defaults only, the effect is the same as if each had uted a separate deed on the same parchment: *Mathewson's* (1596), 5 Rep. 23 a; *S. C. sub nom. Mathewson* v. *Lydiate*, Eliz. 408, 470, 546.

Bond whereby three acknowledged themselves bound "in 000 each, for which we bind ourselves and each of us for himself the whole and entire sum of £1,000 each." *Held*, a several d only: *Collins* v. *Prosser* (1823), 1 B. & C. 682; 1 L. J. .) K. B. 212; 25 R. R. 540.

A, as principal, and B, C, and D, as sureties, executed a bond he form: "We, A, B, C, and D, are held and firmly bound E in the sum of £50 *each*, to be paid to E, his executors, etc.; which payment we hereby bind us and each of us, our and of our heirs, executors, and administrators, and every of m." *Held*, that the bond was the separate bond of each gor, binding each to pay the sum of £50; and therefore the ment of £50 by B was no answer to an action on the bond inst C: *Armstrong* v. *Cahill* (1880), 6 L. R. Ir. 440.

Liability joint and several, under express words.

In the following cases the express words were held to create a t and several liability.

"*Nos vel quemlibet nostrum*": *Hankinson* v. *Sandilands* 14), 1 Brownl. & G. 121. "*Se et quemlibet eorum*": *Bolton* v. (1673), 2 Lev. 56; 3 Keb. 39, 50. "For themselves and every hem": *May* v. *Woodward* (1677), Freem. K. B. 248. "*Pro se quolibet eorum*": *Robinson* v. *Walker* (1702), 1 Salk. 393; 7

Mod. 154. "For themselves and either of them": *Enys* *Donnithorpe* (1760), 2 Burr. 1190.

A deed of assignment by a bankrupt contained a joint covena by the assignees to account for "such money as they or either them" should receive. *Held*, that they were jointly and severa bound: *Primrose* v. *Bromley* (1739), 1 Atk. 89.

Joint and several bond, the condition being for payment of annuity by the obligees in moieties during their lives, and after t death of one by the survivor; the survivor made default. *He* that the estate of the other was liable: *Church* v. *King*, (1836), My. & Cr. 220.

An executor cannot be made liable jointly with another on joint and several bond: *Read* v. *Price*, [1909] 1 K. B. 577, p. 586.

Bond by three binding themselves jointly and their respecti heirs. *Held*, joint and several: *Tippins* v. *Coates* (1853), 18 Be 401; 104 R. R. 486.

A letter of guarantee, signed in the firm name and in that each partner, "We hereby guarantee the payment, etc." *He* to create a joint and several liability: *Ex p. Harding* (1879), Ch. D. 557; 48 L. J. Bk. 115.

Agreement under seal that J and L should assign certain lett patent (which had been granted to J and L, their executors, et "to the end that they, their executors, etc., and every of then should have the benefit thereof), such assignment to contain covenant by the vendors that the letters patent were valid. *He* that the obligation was that J and L had jointly covenanted assign with joint and several covenants by them that the lett patent were valid: *National Society for the Distribution of El tricity by Secondary Generators* v. *Gibb*, [1900] 2 Ch. 280; L. J. Ch. 457.

Covenants by partners.

In *Beresford* v. *Browning* (1875), 20 Eq. 564; on app., 1 Ch. 30, a covenant, in terms creating only a joint liability, to pay ou deceased partner's share in a business was held to be merely arrangement as to the mode of discharging a pre-existing joint several liability, which accordingly did not alter the nature of liability. In the judgment of Jessel, M.R., in that case are ma remarks as to partnership liabilities, which must now be conside with reference to the judgments of Lord Cairns, C., and L Selborne, in *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; L. J. C. P. 705.

Lord Cairns on partnership debts.

"There is no doubt that in many cases and textbooks we the expression that a partnership debt is in equity joint and seve This, however, is only a compendious expression, which must interpreted with reference to what were the functions of the Co

quity as to partnership debts. The only interposition of a t of Equity with regard to partnership debts took place in the inistration of the assets, either of the partnership or of a ased member of the partnership. Where a member of the nership died, the debts became, in the eye of a Court of Law, debts of the survivors; but the survivors, on the other hand, Court of Equity, had the right, as against the estate of a ased partner, to say that his representatives should not with- v any part of the partnership property until all the debts paid or provided for. If, therefore, a Court of Equity was inistering the assets of a deceased partner, it would, in order lear his estate, ascertain his liabilities to the partnership, and this purpose would ascertain the debts due from the co- nership at his death. From this the transition was easy to ng the creditors of the partnership a direct right, and not ely an indirect right through the surviving partners, to come payment against the assets of the deceased partner, and from again the transition was easy to the expression which said t partnership debts, in the eye of a Court of Equity, were t and several, not thereby meaning that a Court of Equity red or changed a legal contract, but merely that the Court order, before distributing assets, to administer all the equities sting with regard to them, would go behind the legal doctrine t a partnership debt survived as a claim against the surviving tners only, and would give the creditor the benefit of the ity, which the surviving partners might have insisted on": Cairns, L.C., *Kendall* v. *Hamilton* (1879), 4 App. Cas. , at p. 516; and see the speech of Lord Selborne in the same e at p. 537.

Liability on covenants implied in law.

If a demise be made by more than one person, the covenant plied by the word "demise," for right to demise is joint, while covenant implied for quiet enjoyment is several: *Coleman* v. *erman* (1689), Comb. 163; 1 Salk. 137; Carth. 97; but both st demise—if one demise and the other confirm, there is no joint venant: *Smith* v. *Pockington* (1831), 1 C. & J. 445; 1 Tyr. 309; R. R. 756.

Demise to two for a term at a rent, with a covenant by them ntly and severally for payment of taxes, etc., but no express venant for payment of rent. *Held*, that the rent was payable by two jointly, though one occupied the whole house and had paid whole rent for five years: *R.* v. *Great Wakering* (1834), 5 & Ad. 971; 3 L. J. M. C. 51.

Where the words of a covenant with several are

If words are clear benefit is determined by words, if ambiguous by interest of covenantees.

clear and unambiguous, the question whether th benefit of the covenant is to enure to the cov nantees jointly, or to each covenantee separatel is to be determined solely by the words; but whe the words are ambiguous, the benefit will enure t them jointly, or to each of them separately, accor ing as their interest in the subject-matter of th covenant is joint or several.

Rule is one of construction, not of law.

It was formerly supposed to be a rule of law that the benefit the covenant must be taken as enuring jointly or severally accor ing as the interest of the covenantees was joint or several: s *Slingsby's Case* (1588), 5 Rep. 18 b; *Eccleston* v. *Clipsham* (166 1 Wms. Saund. 153 (ed. 1871, vol. 1, p. 162); but the true doctrin which was first laid down by Mr. Preston (Shep. Touch. 166), that the rule is one of construction only.

"I think the rule is plain and certain, and requires no authorit it is correctly stated by Mr. Preston in the passage in Shep. Touc (p. 166). Where the words of a covenant are in their natu ambiguous, so that they may be construed either way, then t deed in which they are inserted supplies the mode of their co struction. If it exhibit a several interest in the parties, you m construe it as a several covenant, and *vice versa*. But there no rule to say that words which are expressly a joint covenant (*sic*, *sed quære* with) several persons shall be construed as a seve covenant, unless there is something to lead to that constructio Where there are several parties, if the interest is joint, the covena is construed as a joint covenant. If a party covenants with A a B to do something for B, and the words themselves are otherwi free from ambiguity, it must be a joint covenant": *per* Abing C.B., *Sorsbie* v. *Park* (1843), 12 M. & W. 146, at p. 156; 13 L. Ex. 9, at p. 11; 67 R. R. 283.

"I think the correct rule is laid down by Gibbs, C.J., in *Jam* v. *Emery* (1818), 5 Price, 529, at p. 533; 2 J. B. Moo. 195; R. R. 503, with the qualification stated by Mr. Preston in the no in Shep. Touch. 166. That rule is that a covenant will be constru to be joint or several according to the interest of the parties appe ing upon the face of the deed, if the words are capable of th construction; not that it will be construed to be several by reas of several interests if it be expressly joint": *per* Parke, *Sorsbie* v. *Park* (1843), 12 M. & W. 146, at p. 158.

In *Keightley* v. *Watson* (1849), 3 Exch. 716; (18 L. J. E 239; 77 R. R. 797); Pollock, C.B. (at p. 721), says: "I consid that the inquiry really is as to the true meaning of the covena at the same time bearing in mind the rule—a rule which I am

neans willing to break in upon—that the same covenant cannot reated as joint or several at the option of the covenantee. If a nant be so constructed as to be ambiguous, that is, so as to e either the one view or the other, then it will be joint if the rest be joint, and it will be several if the interest be several. On other hand, if it be in its terms unmistakably joint, then, ugh the interest be several, all the parties must be joined in the on. So, if the covenant be made clearly several, the action must several, though the interest be joint. It is a question of con- ction." In the same case, Parke, B. (at p. 722) says: "The that covenants are to be construed according to the interest of parties is a rule of construction merely, and it cannot be posed that such a rule was ever laid down as could prevent ties, whatever words they might use, from covenanting in a erent manner. It is impossible to say that parties may not, if y please, use joint words, so as to express a joint covenant, and reby to exclude a several covenant, and that, because a covenant y relate to several interests, it is therefore necessarily not to be strued as a joint covenant. If there be words *capable of two structions*, we must look to the interest of the parties which y intended to protect, and construe the words according to that erest." And Rolfe, B. (at p. 726), says: "It appears to me t Mr. Preston's suggestion was perfectly well founded, that the e in *Slingsby's Case* (1588), 5 Rep. 18 b, was not a rule of , but a mere rule of construction." See similar remarks: *per* ule, J., *Beer* v. *Beer* (1852), 12 C. B. 60, at p. 78; 21 L. J. P. 124; 92 R. R. 619.

The case of *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; 58 L. J. B. 302, in which it was said that, according to equity, joint ditors must *prima facie* be taken to be interested as tenants in nmon, and not as joint tenants, is explained by Farwell, J., in *well* v. *Brodhurst*, [1901] 2 Ch. 160, at p. 164; 70 L. J. Ch. 7, as being a decision on a question whether it was clear that the ot was joint, there being a conflict of presumptions whether there s, or was not, a joint tenancy.

Examples.

In the following cases the covenants were held to enure to the nefit of the covenantees jointly; but some of the earlier cases were ided before the rule that clear words are to have their proper ect was established.

Benefit joint.

Agreement under seal by fiddlers that they would not play under, and they were bound in £20 each, *omnibus et cuilibet rum*; and one only brings an action for breach of the covenant. *ld*, that all ought to have joined, as the interest was joint: *encer* v. *Durant* (1689), Comb. 115; 1 Show. 8.

Action of covenant by the herald painters, *et pro quolibet et*

singulis eorum, that they should bring their work to a certai place, and that the money paid for such work, when it should b received, should be brought to the aforesaid place and divide between them in certain parts and proportions. Action by all th others against one who did not bring his work to the appointe place. *Held*, that, the interest being joint, the action was we brought by all : *Saunders* v. *Johnson* (1693), Skin. 401.

Covenant with L and B, their heirs, executors, administrator and assigns, to pay to L and B, their executors, etc., one annui or yearly sum of £30 in the shares and proportions following, *viz* the sum of £15, being one moiety of the annuity to L, his executor etc., and the sum of £15, the remaining moiety, unto B, h executors, etc., to be respectively paid quarterly. The powers f securing the annuity were given to L and B jointly. There was joint power to them to enter up a joint judgment, and a joint pow to sell certain stock. The annuity was redeemable on payment a certain sum to L and B, their executors or administrators. an action brought by L alone for his share of the annuity; hel that the covenant was a joint covenant, and that the interest the annuity was joint, and that L could not sue alone : *Lane* *Drinkwater* (1834), 1 Cr. M. & R. 599; 5 Tyr. 40; 4 L. J. Ex. 3 40 R. R. 640.

F and W demised land to the defendant, who covenanted wi F and W, their heirs, executors, etc., to repair, etc. F died, a his heir brought an action for breaches of covenant committed sin F's death. *Held*, that W ought to have joined in the actio *Foley* v. *Addenbrooke* (1843), 4 Q. B. 197; 12 L. J. Q. B. 16 62 R. R. 326.

Demise by persons who, on the face of the lease, appeared to tenants in common; covenants by the lessees with the lessors " a each and every of them, their and every of their heirs, executo administrators, and assigns, to repair, etc." *Held*, that the bene of the covenants was joint and not several : *Bradburne* v. *Botfie* (1845), 14 M. & W. 559; 14 L. J. Ex. 330; 69 R. R. 749.

Covenant by A " with B, and also as a distinct covenant wi C " to pay interest on money advanced by B as C's truste *Held*, that both B and C ought to sue for breach of covenan *Hopkinson* v. *Lee* (1845), 6 Q. B. 964; 14 L. J. Q. B. 101; R. R. 617.

Demise by tenants in common, " according to their seve estates," the lessees covenanting with them " and their respecti heirs and assigns " to repair. *Held*, that the benefit of the covena was joint and not several : *Thompson* v. *Hakewill* (1865), 19 C. (N.S.) 713; 35 L. J. C. P. 18; 147 R. R. 729.

The same rule was applied to a contract not under seal in *Pu*

tringfield (1858), 3 C. B. (N.S.) 2; 4 C. B. (N.S.) 364; 27 C. P. 34; 111 R. R. 517.

n the following cases the covenants were held to enure to the fit of the covenantees severally; but some of these cases also decided before the rule above stated was fully established. Benefit several.

and B covenant with C to sell land to him. "*Item*, it is ed between the parties" that C shall pay to A so much money. non-payment of the purchase-money, an action was brought A and B. *Held*, that it ought to have been brought by A : *Tippet* v. *Hawkey* (1688), 3 Mod. 263.

Covenant with A and B to receive the rents due to A and B to pay one moiety to each of them. *Held*, that A could bring action for his moiety without B : *Lilly* v. *Hodges* (1723), od. 166.

Agreement under seal by tenants in common to sell land. enant by the purchasers with the vendors "and each of them, r and each of their executors, etc.," to pay the purchase-ney to the vendors, "their executors, etc., in the proportions" owing, that is to say, etc. *Held*, that as the interest of the enantees was several, the benefit of the covenant was several : *nes* v. *Emery* (1818), 8 Taunt. 245; 5 Pri. 529; 19 R. R. 503.

By deed reciting the grant of one annuity to A and of another uity to B, C covenanted with A and B, their executors, etc., pay the annuities or either of them if the grantor should make ault. *Held*, that the covenant being for the payment of a tinct annuity to each of the covenantees, one might sue without other : *Withers* v. *Bircham* (1824), 3 B. & C. 254; 5 Dowl. & . 106; 3 L. J. (o.s.) K. B. 30; 27 R. R. 350.

Covenant by the master of a vessel with the part owners to pay tain moneys to them "and to their and every of their several d respective heirs, executors, administrators, and assigns," at a tain bank, "and in such shares and proportions as were set ainst their several and respective names." *Held*, that their erests being separate, they must sue separately : *Servante* v. *mes* (1829), 10 B. & C. 410; 8 L. J. (o.s.) K. B. 64; 34 R. R. 465.

By deed, reciting four several contracts for purchase of land m different owners, the defendant covenanted with each of the ners to complete the contract. *Held*, that one of the vendors ne might bring an action on the covenant : *Poole* v. *Hill* (1840), M. & W. 835; 10 L. J. Ex. 81; 55 R. R. 805.

By deed reciting a proposal by the owners of a colliery to divide into a certain number of shares, and an agreement for sale to e parties of the third part of so many of the shares respectively were set opposite their respective names, the owners covenanted

with each of the purchasers, their executors, etc., to show a goo title. *Held*, that the interest of each covenantee was distinct, and therefore, that he could bring his action for breach of covenan without the others: *Mills* v. *Ladbroke* (1844), 7 Sco. N. R. 1005 7 M. & Gr. 218.

By deed reciting that A had agreed to purchase land from th plaintiff, and to sell it to the defendants at a certain price, an containing covenants to that effect, the defendants covenante with the plaintiff, and as a separate covenant with A, "to pa to the plaintiff, or to A, in case the plaintiff shall then have bee paid his purchase-money," the unpaid part of the purchase-mone on a certain day, and to pay interest in the meantime to th plaintiff. *Held*, that the plaintiff might sue without A in respec of the interest: *Keightley* v. *Watson* (1849), 3 Exch. 716; 1 L. J. Ex. 239; 77 R. R. 797.

Covenant by six directors of a joint stock company, with fiv others, their executors, etc., that they would indemnify the fiv others, their executors, etc., their estates and effects from a claims. *Held*, that one of the five who had been made liable i respect of some claims could sue alone, the words of the covenar admitting of being construed as made with the five severally *Haddon* v. *Ayers* (1858), 1 El. & El. 118; 28 L. J. Q. B. 105 117 R. R. 156.

An assistant, employed by two surgeons, agreed that he woul not at any time carry on the profession or business of a surgec in Newtown, or within ten miles thereof. *Held*, that after th surgeons had dissolved partnership, one of them alone could su for a breach of the agreement, the assistant having become assista to the other: *Palmer* v. *Mallett* (1887), 36 Ch. D. 411; 57 L. Ch. 226.

Where a covenant running with the land was entered in with one lessor, who afterwards devised the reversion to six tenan in common, one tenant in common was allowed to maintain a action for damages for breach of covenant without joining th others: *Roberts* v. *Holland*, [1893] 1 Q. B. 665; 62 L. J. Q. B. 62

Where one covenantee has no interest.

A covenant with two or more, or with two more and each and every of them, where one them has no beneficial interest in the subjec matter of the covenant, will be construed as a cov nant with them jointly, and the benefit of it w survive.

Examples.

Indenture of covenants between A and B, of the one part, a C, of the other part; and (*inter alia*) it is agreed between t

s that C shall enter into a bond to pay a certain sum to A. n action brought by the administrator of A for breach of ant, held, that he could not maintain it, as the benefit of the ant survived to B : *Rolls* v. *Yate* (1611), Yelv. 177; *S. C. om. Yate* v. *Roules*, 1 Buls. 25; *sub nom. Yates* v. *Rolles*, wnl. & G. 207.

venant with A and also with B, to pay an annuity to A. , that on the death of A the legal interest in the covenant ved to B, and that the executor of A could not sue : *Anderson artindale* (1801), 1 East, 497; 6 R. R. 334; Lord Kenyon, C.J., (at p. 501) : "Though the benefit were only to one of them, both had a legal interest in the performance of it; and, fore, the legal interest being joint during the lives of both, on death of one, it survived to the other."

ease by T, tenant for life, and R, a receiver appointed by the t of Chancery, to H, for a term of years; covenants by H with nd other the receiver or receivers for the time being, and to with such other person or persons as for the time being should ntitled to the freehold or inheritance, or to the rents and profits, e said premises, and to and with every of them. *Held*, that action for breach of covenant committed during T's lifetime d not be brought by T's executor, but that it must be brought he receiver and freeholder for the time being jointly : *Southcote Ioare* (1810), 3 Taunt. 87; 12 R. R. 600.

Covenant by lessee with A and B, and their respective executors, inistrators and assigns, and also with C, his executors, inistrators, and assigns, to repair; A had no legal interest in land. *Held*, that the benefit of the covenant enured to A, B, C jointly, and that, after the death of A, B and C might in an action on the covenant : *Wakefield* v. *Brown* (1846), . B. 209; 15 L. J. Q. B. 373; 72 R. R. 225.

Section 81 of the Law of Property Act, 1925, enacts :— New Law.

(1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves, and where made after the commencement of this Act shall be construed as being also made with each of them.

(2) This section extends to a covenant implied by virtue of this Act.

New Law.

(3) This section applies only if and so far as a contrary intenti is not expressed in the covenant, contract, bond, or oblig tion, and has effect subject to the covenant, contra bond, or obligation, and to the provisions therein containe

(4) Except as otherwise expressly provided, this section appli to a covenant, contract, bond, or obligation made implied after the thirty-first day of December, eighte hundred and eighty-one.

This section is an extension of section 60 of the Conveyanci Act, 1881, which it replaces.

For the statutory effect of an advance of money on a joi account, see section 111 of the Law of Property Act, 1925, replaci section 61 of the Conveyancing Act, 1881.

CHAPTER XXX.

MUTUAL COVENANTS.

ndent and Independent Covenants distinguished: Condition Precedent: Whether Performance of Covenant is a Condition Precedent is a Question of Construction: Causes of Dependency: Dependency owing to Time fixed for Performance of Covenants: Covenant by Defendant to be performed (i) before, (ii) simultaneously with, or (iii) after, the Performance of Covenant by Plaintiff: Dependency arising from nature of Covenants: Covenant by Plaintiff the whole, or part only, of the Consideration for the Covenant by Defendant: Clauses introduced by Participles or the words "To be."

Dependent and independent covenants distinguished.

'HERE a deed contains mutual covenants a question of great y arises—*viz.*, Are the covenants dependent or independent? her words, can one of the parties bring an action against the for breach of covenant, without having performed his own ıant? The question generally arises as a point of pleading, the answer to it depends entirely on the construction of the

Condition precedent.

he relation between covenants, one of which is dependent on other, is sometimes expressed by saying that the performance e one is a condition precedent to liability under the other.

Whether covenants are dependent or independent is a question of construction.

In contracts containing executory considerations or mutual ises, the obligation of the one promise may be quite endent of the performance of the other. But it may appear the construction of the mutual promises, or from the con- on of their matter, that the obligation of the one promise is ssly or impliedly conditional upon the due performance of the , in which case the promises are not only mutual but also ıdent": Leake on Contracts, Pt. 3, Ch. 2 (7th ed.), p. 477. The dependence or independence of covenants is to be collected the evident sense and meaning of the parties; and, however posed they may be in the deed, their precedency must depend e order of time in which the intent of the transaction requires performance": *per* Lord Mansfield, C.J., *Kingston* v. *on* (1773), cited 2 Doug. 689.

Technical words not necessary.

"There are no precise technical words required in a deed make a stipulation a condition precedent or subsequent, neith does it depend upon the circumstance whether the clause is plac prior or posterior in the deed, so that it operates as a proviso covenant. For the same words have been construed to opera as either the one or the other, according to the nature of t transaction": *per* Ashhurst, J., *Hotham* v. *East India Co.* (178 1 T. R. 638, at p. 645; 1 R. R. 333.

"Conditions are to be construed to be either precedent subsequent, according to the fair intention of the parties to collected from the instrument, and technical words (if there any to encounter such intention) should give way to that inte tion": *per* Lord Kenyon, C.J., *Porter* v. *Shepherd* (1796), 6 T. 665, at p. 668; 3 R. R. 305, cited with approval by Lord Chelm ford in *Roberts* v. *Brett* (1865), 11 H. L. C. 337, at p. 354; L. J. C. P. 241; 145 R. R. 223.

"The rule has been established by a long series of decisio in modern times, that the question, whether covenants are to held dependent or independent of each other, is to be determin by the intention and meaning of the parties as it appears on t instrument, and by the application of common sense to ea particular case; to which intention, when once discovered, technical forms of expression must give way. . . . The parti to a contract may, undoubtedly, if they think proper, agree that the right of one party to maintain an action against the oth "shall be conditional, and shall depend on" the plaintiff's "str performance of the covenants entered into by himself; and if wor are used in the contract so precise, express, and strong, that su intention, and such intention only, is compatible with the ter employed, however inconsistent it may be with general princip of reasoning, a Court can only give effect to such declared intenti of the parties. The only question in every particular case whether such intention is so declared": *per* Tindal, C.J., *Stave* v. *Curling* (1836), 3 Bing. N. C. 355, at p. 368; 6 L. J. C. 41; 43 R. R. 682; and in *Graves* v. *Legg* (1854), 23 L. J. E 228; 96 R. R. 931; 9 Exch. 709, Parke, B. (at p. 716), spea of "the numerous cases in which it has been laid down that t general rule is to construe covenants and agreements to be depe dent or independent according to the intent and meaning of t parties to be collected from the instrument, and, of course, to t circumstances legally admissible in evidence with reference which it is to be construed." See also *Parkin* v. *South Hett Coal Co.* (1907), 97 L. T. 98; (1908), 98 L. T. 162, as regards t principle enunciated in *Stavers* v. *Curling* (*supra*).

"The clearest words of condition must yield to the promine

ion of the parties as gathered from the whole instrument" : yles, J., *London Gas Light Co.* v. *Chelsea Vestry* (1860), 8 (N.S.) 215, at p. 239; 125 R. R. 630.

I do not think that the rules which are laid down as to the uction of agreements in which there are cross contracts, in to see whether these cross contracts are dependent or endent, are of much assistance where, as here, the question ether a matter is expressly made a condition precedent. . . . gree that the question is, What is the intention to be collected the words?" *per* Lord Blackburn, *London Guarantie Co.* v. *pley* (1880), 5 App. Cas. 911, at p. 917.

Causes of dependency.

ovenants may be dependent, either owing to the time when have to be performed, or owing to their nature, or subject- er.

Dependency owing to time.

here the dependency arises owing to the time fixed for rmance, three cases may occur, for if *D* be the thing nanted to be done by D, and *P* the thing covenanted to be by P, *first*, the time for doing *D* may be before the time for *P*; *secondly*, *D* and *P* may have to be done simultaneously; *ly*, the time for doing *D* may be after the time for doing *P*.

Where time for thing to be done by defendant may happen before time for thing to be done by plaintiff, performance by plaintiff is not a condition precedent to action.

If the time fixed for doing *D* must, or may, happen before the time fixed for doing *P*, the doing of *P* is not a condition precedent to the doing of *D*, and P can maintain an action without showing that he has done, or offered to do, *P*.

his rule is stated in the notes to *Pordage* v. *Cole* (1670), 1 Wms. d. 320, note 4 (p. 551, ed. 1871), as follows: "If a day be inted for payment of money, or part of it, or for doing any act, and the day *is* to happen, or *may* happen, *before* the which is the consideration of the money, or other act, is to erformed, an action may be brought for the money, or for not such other act *before* performance; for it appears that the relied upon his *remedy*, and did not intend to make the *rmance* a condition precedent: and so it is where *no time* is for the performance of that which is the consideration for the y or other act."

"For."

When one promises, agrees, or covenants to do one thing *for* ner, there is no reason he should be obliged to do it till that , *for* which he promised to do it, be done, and the word 'for' condition precedent in such cases. But upon this head some sities are to be observed. *First*, if there be a day set for the ent of money, or doing the thing which one promises, agrees, ovenants to do, for another thing, and that day happens to

incur before the time the thing, for which the promise, agreeme or covenant is made, is to be performed by the tenor of the agre ment; there, though the words be 'that the party shall pay t money,' or 'do the thing *for* such a thing,' or, 'in consideration such a thing,' after the day is past the other shall have an acti for the money or other thing, although the thing, *for* which t promise, agreement, or covenant was made, be not performed; f it would be repugnant there to make it a consideration preceden and, therefore, they are in that case left to mutual remedies, which, by the express words of the agreement, they have depende *Vide* Y. B. 48 Edw. 3 (1374), 2, 3, cited in *Ughtred's Case* (159 7 Rep. pt. 2, 10 b, where the diversity is taken when there a mutual remedies and not : it is thus put in that book : Sir R. Po covenants with Sir R. Tolcelser to serve him with three esquires the wars of France. Sir R. Tolcelser covenants, *in consideration* those services, to pay him so much money; and there it is sa action will lie for the money without any services performed. B if you look into the book at large, you will find it was upon t diversity which I have taken; for the Case in 48 Edw. 3, 2, 3, R. Pool covenants with R. Tolcelser to serve him with thr esquires in the wars of France, and R. Tolcelser covenanted wi him to pay him so much for the service; and it was further agree that twenty marks of the money should be paid in England, at day certain, before they went for France, and the rest by quarte payments, which might likewise incur before the service; and up action brought by Sir R. Pool, it was objected that the service w not performed; but there was no room for that objection upon t diversity which I have taken, the money, by the agreement, bei made payable at a day certain, before the service was to have be performed" : *per* Holt, C.J., *Thorp* v. *Thorp* (1701), 12 Mod. 4 at p. 460; 1 Ld. Raym. 662; Holt, 28, 96; Lutw. 75; 1 Salk. 17

In Platt on Covenants, p. 96, it is said : "The case in the Y. is inaccurately stated by Lord Coke. . . . It appears in the Y. that the covenant was that half the money was to be paid England before they went to France : the principle therefore that case agrees with the doctrine of Holt in *Thorpe* v. *Thor* as is observed by him in 12 Mod. 461."

In *Roberts* v. *Brett* (1856), 18 C. B. 561, at p. 573; 25 L. C. P. 280, at p. 286, Jervis, C.J., after citing this rule (as stat in the notes to *Pordage* v. *Cole*), says : "But, after all, that r only professes to give the result of the intention of the partie and where, on the whole (? instrument), it is apparent that t intention is that that which is to be done first is not to depe upon the performance of the thing that is to be done afterwar the parties are relying on their remedy, and not on the performa

e condition; but where you plainly see that it is their inten- to rely on the condition and not on the remedy, the perform- of the thing is a condition precedent."

It has long been the practice of companies insuring against . . . to incorporate in their policies . . . various stipulations natters to be done by the assured making a claim before the pany is to pay them, and (as the remedy by action for not plying with these stipulations would not afford them any pro- on), to make the fulfilment of those conditions a condition edent to their obligation to pay. . . . In the present case . . . ar as any of their stipulations . . . are for something to be preliminary to the completion of the proof satisfactory . . . he directors, from which completion of proof the time of the nent is to run, I think it is not disputed that they have effected object. But such stipulations as relate to things to be done payment is due are not, and cannot be, conditions prece- " : *per* Lord Blackburn, *London Guarantie Co.* v. *Fearnley* 0), 5 App. Ca. 911, at pp. 915, 916.

When the parties to a contract make a stipulation in which ing is expressed as to time, and which might, according to own terms, be fulfilled either within or after the period during ch it could operate as a condition precedent, and the parties go on to declare that it shall be a condition precedent, I think declaraton must, *prima facie*, be held to be a sufficient expres- of their intention to limit the time of performance to the cedent period " : *per* Lord Watson, *ibid.*, at p. 920.

I think it is the duty of all insuring companies to state in r and plain terms, as conditions precedent, those provisions which are such, not to wrap them up in a number of clauses ch are not conditions precedent at all. . . . *London Guarantie* v. *Fearnley*, on which the appellants relied, was a decision on articular clause in a particular policy, on which eight Judges e evenly divided. It lays down no new principle and has no ring on the present case " : *per* Farwell, L.J., in *Re Bradley Essex and Suffolk Accident Indemnity Society*, [1912] 1 K. B. , at p. 433; 81 L. J. K. B. 523.

Examples.

Agreement under seal that B shall pay A a sum of money his lands on a certain day, but no day was fixed for the con- ance. *Held*, that A might bring his action for the money ore conveyance : *Pordage* v. *Cole* (1670), 1 Wms. Saund. 319 548, ed. 1871).

B covenanted to pay seamen's wages yearly, and " in considera- thereof, A covenanted to pay B £42 every month." *Held*, t B might bring an action for the £42 without showing that he paid the wages : *Russen* v. *Coleby* (1734), 7 Mod. 236.

Agreement under seal that plaintiff should take defendant a partner, to commence *from* and *after* September 29 : covenant b the defendant to pay £300 *on* or *before* that day as a premium The plaintiff can bring an action for non-payment without tenderin articles of partnership : *Walker* v. *Harris* (1793), 1 Anst. 245.

B covenants to build a house for A, and to finish it before certain day, in consideration of a sum of money, which A covenant to pay him by instalments as the building proceeds. *Held*, that can bring his action for the money, though the building be n complete at the time appointed : *Terry* v. *Duntze* (1795), 2 H. B 389; 3 R. R. 423.

B, in consideration of the sum of £250 paid by A, and of th further sum of £250 to be paid by him, covenanted with A t teach him the art of bleaching linen with all possible despatch; an A covenanted that he would on a certain day, or sooner if B shou before that time have instructed him, pay the further sum of £25 *Held*, that B might sue A for the £250 without averring that had taught him the art of bleaching linen : *Campbell* v. *Jon* (1796), 6 T. R. 570; 3 R. R. 263.

Agreement under seal by A to purchase, and by B to sell, certa property, and A thereby covenanted to pay on or before a fixe day, as the consideration of the sale, a certain sum with intere till completion. *Held*, that B might sue for the purchase-mon without previously tendering a conveyance : *Mattock* v *Kingla* (1839), 10 Ad. & El. 50; 2 Per. & D. 343; 8 L. J. Q. B. 215; R. R. 322.

Plaintiff and defendant agreed under seal to enter into partne ship as apothecaries till January 1, 1846, that defendant shou pay plaintiff £800, and should be entitled to all the profits the business, and that plaintiff should, after January 1, 184 introduce the defendant as his successor, and use his be endeavours to establish him in the business; and in considerati thereof, the defendant covenanted to pay a further sum of £ to plaintiff on March 25, 1846. *Held*, that the introduction the defendant by the plaintiff was not a condition precedent the payment of the £50, as the plaintiff would still be under obligation to introduce the defendant after March 25, 1846 : *Juds* v. *Bowden* (1847), 1 Exch. 162.

Covenant by defendant that within six months from the passi of a proposed railway bill, and before the company should ent upon the plaintiff's land, except for certain specified purposes, would pay to plaintiff £4,000 for the purchase of certain lan and covenant by plaintiff, that, on payment of the said sum £4,000 with interest, after the expiration of six months from t passing of the bill he would convey the land. *Held*, that plaint

ld sue for the money before conveying the land: *Sibthorp* v. *nel* (1849), 3 Exch. 826; 77 R. R. 852.

Covenant in a lease to build certain stables, "the whole of ch were to be left to the superintendence of the plaintiff and defendant's son." *Held*, that such clause was neither a con- on precedent nor concurrent, and that the covenant was olute: *Jones* v. *Cannock* (1850), 5 Exch. 713; 19 L. J. Ex. ; 82 R. R. 850.

Plaintiff covenanted with defendant to deliver up a farm on ertain day, and in the meantime to cultivate it on the four- rse system, and that on the surrender he would deliver up an eement to be cancelled, and would surrender all his unexpired n and interest, and, if defendant required, would at any time rwards execute any deed for further assurance; and defendant enanted with plaintiff that if plaintiff delivered up the farm, in the meantime cultivated it on the four-course system and formed all and singular other the covenants, etc., then the endant would pay for the manure on the delivery up of the m. *Held*, that plaintiff could sue on the covenant to pay for manure, though he had not delivered up the agreement: *wson* v. *Smythies* (1858), 28 L. J. Ex. 97; 117 R. R. 1801; H. & N. 840. Baron Bramwell (at p. 843) said: "The defen- it's covenant appears to be made conditional upon the perform- e of *all* the covenants on the part of the plaintiff. But some hem, such as that for further assurance, are not to be performed after the time for payment. Therefore it is impossible to strue the covenant literally. The reasonable construction is t the plaintiff is entitled to recover for the manure, and that breach of his covenant is the subject of a cross action." amwell, Watson, and Channell, BB., all point out that delivery of the agreement was not of the essence of the contract.

The plaintiff guaranteed the payment at maturity to the defen- nt of certain bills held by him, and the defendant guaranteed payment to the plaintiff of certain goods sold by him to a third son. *Held*, that the guarantees were independent: *Christie* v. *relly* (1860), 7 C. B. (N.S.) 561; 29 L. J. C. P. 153; 121 R. R. 617.

Covenant by wife's father in marriage articles to make certain yments during his life, and to settle a certain portion of his ate at his death on the husband and wife during their respective es, and after their deaths on their issue; and the husband enanted to insure his life and to settle the policy and other perty in like manner: in default of issue, the property settled by husband was to revert to him. The marriage took place, and wife died without issue; the husband neither insured his life nor de a settlement according to his covenant, and refused to

execute a settlement drawn according to the articles. *Held*, th the performance by the husband of his covenant was not a conditi precedent to the performance by the father : *Jeston* v. *Key* (187 L. R. 6 Ch. 610; 40 L. J. Ch. 503.

Action on a policy guaranteeing the plaintiff against embezzl ment by a servant of the plaintiff. The policy expressly stated th it was " subject to the conditions herein contained, which shall conditions precedent to the right to recover under this policy Among the conditions was one that the employer should, if require prosecute the servant for any wrongful act covered by the polic The defendants pleaded that they had required plaintiff to prosecut but he had not done so. Lords Blackburn and Watson held th the effect was that all the conditions were expressly made conditio precedent. Lord Selborne, C., dissented on the ground that t condition in question was not in its nature precedent : *Lond Guarantie Co.* v. *Fearnley* (1880), 5 App. Cas. 911. See al *Re Bradley and Essex, etc., Accident Indemnity Society*, [191 1 K. B. 415; 81 L. J. K. B. 523.

Where covenants are to be performed simultaneously, performance by plaintiff is a condition precedent to action.

> Where *D* and *P* are to be done simultaneousl neither D nor P can maintain an action witho showing that he has done, or offered to do, *D* or respectively.

This rule is stated in the notes to *Pordage* v. *Cole* (1670), Wms. Saund. 320, note (4), s. 5 (ed. 1871, p. 556), as follow " Where two acts are to be done *at the same time*, as where covenants to convey an estate to B on such a day, and in consider tion thereof B covenants to pay A a sum of money on the sar day, neither can maintain an action without showing performan of, or an offer to perform, his part, though it is not certain which them is obliged to do the first act; and this particularly applies all cases of sale."

Examples.

Mortgagor agreed to release his equity of redemption, " consideration of which " the mortgagee agreed to pay him £ *Held*, that the release was a condition precedent to the payme of the money : *Thorp* v. *Thorp* (1701), 12 Mod. 455; 1 Ld. Ray 662.

Action for debt on a bond conditioned for the payment of much money " on request, the plaintiff assigning over to the defe dant such a judgment against C." Judgment for the plainti it appearing that he had offered to assign the judgment : *Turn* v. *Goodwin* (1714), 10 Mod. 154, 189, 222.

A covenanted with B that, upon the tender and payment B of a certain sum on or before a certain day, A would trans

tain stock to B. The money not being paid, A brought his ion; but as he did not sufficiently allege a transfer or tender the stock, judgment for B: *Stapleton* v. *Shelburne* (1725), 1). P. C. 215.

Covenant by defendant to give up his business on a certain day the plaintiff, and covenant by plaintiff to accept the business, l "at and before the delivery of the deeds procure good security be given to the defendant, to be approved of by the defendant, the payment of £250 monthly to the defendant." The plain- sued the defendant for not giving up his business and the fendant pleaded that the plaintiff had not offered or given suffi- nt security; judgment for the defendant, "because the part to performed by the plaintiff was clearly a condition precedent": *ngston* v. *Preston* (1773), cited at length in *Jones* v. *Barkley* 781), 2 Doug. 684, at p. 689.

Agreement by A to sell to B an estate for a certain sum, in nsideration whereof B agreed to pay that sum, and on failure pay £21. *Held*, that the covenants were dependent, and that could not recover the £21 without showing a conveyance or a nder of a conveyance: *Goodisson* v. *Nunn* (1792), 4 T. R. 761.

Plaintiff covenanted to sell to the defendant a schoolhouse, and convey the same on or before August 1; and in consideration ereof the defendant covenanted to pay the plaintiff £120 on or fore August 1. *Held*, that the plaintiff could not maintain his tion for the £120 without averring that he had conveyed or ndered a conveyance: *Glazebrook* v. *Woodrow* (1799), 8 T. R. 6; 4 R. R. 700.

Covenant by A to convey an estate, in consideration of which covenants to pay certain moneys. "It is clear that these are pendent covenants, and can it be contended for an instant that ough the one has not conveyed he may call upon the other to y the money?" *per* Lord Kenyon, C.J., *Heard* v. *Wadham* 801), 1 East, 619, at p. 629.

If the time fixed for doing *D* must happen after the time fixed for doing *P*, the doing of *P* is a condition precedent to the doing of *D*, and P cannot maintain an action without showing that he has done, or offered to do, *P*.

Where time for thing to be done by plaintiff must happen before time for thing to be done by defendant, performance by plaintiff is a condition precedent to action.

This rule is stated in the notes to *Pordage* v. *Cole* (1670), 1 Wms. und. 320, note (4), s. 2 (ed. 1871, p. 552), as follows: "When a y is appointed for the payment of money, etc., and the day to happen *after* the thing, which is the consideration of the

money, etc., is to be performed, no action can be maintained fo the money, etc., before performance."

"If there be a day for the payment of the money, or doing o other act, *for* another, and that day is to be after the performanc of the thing *for* which the promise, etc., was made, there, if th agreement be to pay the money, or do other thing, '*for*' or '*i consideration*,' or such other words that would make a conditio precedent, there such things, for the doing or performing of whic the other agrees to pay the money, or do other thing, must b averred to maintain an action": *per* Holt, C.J., *Thorp* v. *Thor* (1701), 12 Mod. 455, at p. 462; 1 Ld. Raym. 662.

Examples. By marriage articles the intended husband covenanted to settl £2,000 in a particular manner and the intended wife's fathe covenanted to make a settlement; but it was expressly agreed that before the father should make the settlement which he had agree to make, the husband should purchase and settle £840 per annu part of the £2,000 per annum. The marriage took effect, and th father died before anything was done; then the wife died withou issue. *Held*, on a suit by the husband against the infant heir o the father, that the settlement of the £840 by the plaintiff was condition precedent to the performance of the covenant by th father: *Feversham* v. *Watson* (1680), Finch, Ca. Ch. 445; Freem Ch. 35.

Agreement for sale of lands, vendors to deduce title, an purchasers to prepare conveyance and pay for the lands. *Held* that deduction of title was a condition precedent to an action fo the purchase-money: *Thames Haven Dock Co.* v. *Brymer* (1850) 5 Exch. 696; 19 L. J. Ex. 321; 82 R. R. 839.

Agreement under seal that the plaintiffs should supply, and tha the defendants should accept, coke, "to be to the satisfaction o the defendants' inspecting officer for the time being." *Held*, tha it was a condition precedent to the right of the plaintiffs to insis upon the defendants' acceptance of the coke that it should be t the satisfaction of their inspecting officer: *Grafton* v. *Easter Counties Ry. Co.* (1853), 8 Exch. 699; 91 R. R. 712.

An agreement under seal between A and B contained severa stipulations, and it was agreed and declared "that for the tru performance of the covenants by A hereinbefore contained, an for securing any penalties which he may incur under thes presents," A and two responsible sureties "shall within ten day after the execution of these presents, execute a bond to B in penalty of £5,000," and that B shall execute a similar bond to A *Held*, *first*, that A's covenant to give a bond, and B's like covenan were independent; *secondly*, that A's covenant to give a bond and B's liability under his other stipulations were dependent, s

t it was a condition precedent to A's right to recover damages inst B in respect of a breach of such stipulations, that A should e given the bond, and that the fact of B not having given his d did not better A's position: *Roberts* v. *Brett* (1865), 11 L. C. 337.

Charter-parties.

In many instances this rule has been applied to the construc- n of charterparties, where, the covenant being that the merchant uld pay the freight on delivery of the goods at a certain place, goods were not delivered; because part of them had been taken pirates: *Bright* v. *Cowper* (1612), 1 Brownl. & G. 21 (in this e it is not clear whether the whole, or only part of the, freight s claimed); or the ship did not arrive: *Clarke* v. *Gurnell* (1612), Bulst. 167; or the ship was wrecked before arrival: *Cook* v. *nnings* (1797), 7 T. R. 381; 4 R. R. 468; *Gibbon* v. *Mendez* 818), 2 B. & Ald. 17; 20 R. R. 337; *Mitchell* v. *Darthez* (1836), Bing. N. C. 555; 5 L. J. C. P. 154; 42 R. R. 658; or the ship s wrongfully seized and prevented from going on her voyage: *ith* v. *Wilson* (1807), 8 East, 437; or the goods were seized by foreign Government: *Storer* v. *Gordon* (1814), 3 M. & S. 308; R. R. 499; or the ship, in pursuance of directions from the ighter's agent, proceeded to a port different from that named the charterparty: *Thompson* v. *Brown* (1817), 7 Taunt. 656; where the merchant was held justified in declining to perform part of the contract on the ground that the ship was to sail a certain day and failed to do so: *Glaholm* v. *Hays* (1841), Man. & Gr. 257; 10 L. J. C. P. 98; 58 R. R. 399; see *Croockewit* *Fletcher* (1857), 1 H. & N. 893; 26 L. J. Ex. 153; 108 R. R. 2; or that she was not ready to receive cargo at the time agreed on: *Oliver* v. *Fielden* (1849), 4 Exch. 135; 18 L. J. Ex. 253; 80 R. 492; but the discussion of cases on charterparties is foreign the scope of this work.

Arbitration.

Dependency in respect of time may be illustrated by the cases which an instrument contains an agreement to refer to arbitration y matter of dispute arising under the instrument.

Policies.

Policy of marine insurance, condition that the sum to be paid loss should be ascertained by arbitration, no action to be brought after arbitration, and then only for such sum as the arbi- tor should award. *Held*, that till award made no action was intainable: *Scott* v. *Avery* (1855), 5 H. L. C. 811; 25 L. J. Ex. 3; 101 R. R. 392; *Tredwen* v. *Holman* (1862), 1 H. & C. 72; L. J. Ex. 398; 130 R. R. 380; *Caledonian Insurance Co.* v. *lmour*, [1893] A. C. 85; *Woodall* v. *Pearl Assurance Co.*, [1919] K. B. 593; 88 L. J. K. B. 706; *Board of Trade* v. *Cayzer*, *ine & Co.*, [1927] A. C. 610; 96 L. J. K. B. 872.

A similar decision was given in the case of an accident policy:

Braunstein v. *Accidental Death Insurance Co.* (1861), 31 L. J Q. B. 17; 1 B. & S. 782; 124 R. R. 745.

In a policy of fire insurance wherein it was agreed "that i shall be a condition precedent to any right of action or suit upo this policy that the award by such arbitrator, arbitrators or umpir of the amount of the loss or damage if disputed shall be firs obtained." *Held*, on appeal to the House of Lords by one of th insured against an insurance company that the repudiation by th company of the claim on a ground going to the root of the contrac precluded the company from pleading the arbitration clause a a bar to action to enforce the claim: *Jureidini* v. *Nationa British, etc., Insurance Co.*, [1915] A. C. 499; 84 L. J. K. B. 640 distinguishing *Scott* v. *Avery* (*supra*).

Fire policy, condition that loss should be paid after adjustmen any difference to be submitted to arbitration, and award to b conclusive. *Held* (Bramwell, B., dissenting), that award was condition precedent: *Elliott* v. *Royal Exchange Assurance Co* (1867), L. R. 2 Ex. 237; 36 L. J. Ex. 129; *Viney* v. *Bignold* (1887 20 Q. B. D. 172; *Trainor* v. *Phoenix Fire Assurance Co.* (1892 65 L. T. 825; *Spurrier* v. *La Cloche*, [1902] A. C. 446; 71 L. J P. C. 101.

In *Dawson* v. *Fitzgerald* (1876), L. R. 9 Ex. 7; 1 Ex. D. 257 45 L. J. Ex. 893, the defendant, a lessee, covenanted with th plaintiffs, his lessors, that he would not keep up an injurio quantity of ground game, and that in case he should do so, h would pay to the plaintiffs a fair and reasonable compensatio "the amount of such compensation, in case of difference, to b referred to the arbitration of two arbitrators," etc. The plaintif sued for breach of the covenant to pay compensation: the defenda pleaded that there had been no reference to arbitration. majority (Kelly, C.B., and Pigott, B.) of the Court below hel that the plea was good, on the ground that the covenant to pa compensation and the covenant to refer were dependent covenant and that arbitration and award were a condition precedent t liability. Bramwell, B., who dissented, stated his view of th law (L. R. 9 Ex., at p. 10), as follows: "If there be a covena to pay in a certain event, and a separate and collateral covena that, in case of difference, that difference shall be referred t arbitration, the two are distinct from each other, and one may b broken whether the other be broken or not; and it is no matt whether the two covenants are in different deeds, or in the san deed at different parts of it, or following each other consecutivel If, on the other hand, there is only a covenant to pay whatev upon arbitration shall be found to be due, then no action can b maintained until the arbitration has taken place." On appea

judgment of the majority of the Court below was reversed. sel, M.R., said (1 Ex. D. p. 260): "I take the law, as settled the highest authority—the House of Lords—to be this. There two cases where such a plea as the present is successful: first, ere the action can only be brought for the sum named by the itrator; secondly, where it is agreed that no action shall be ought till there has been an arbitration, or that arbitration shall a condition precedent to the right of action. In all other cases ere there is, first, a covenant to pay, and secondly, a covenant refer, the covenants are distinct and collateral, and the plaintiff y sue on the first, leaving the defendant to pursue one of two irses, either to bring an action for not referring, or to apply der section 11 of the Common Law Procedure Act, 1854, to stay action till there has been an arbitration." This case was tinguished in *Hallen* v. *Spaeth*, [1923] A. C. 684; 92 L. J. C. 181.

A clause which stipulates that all matters in difference should to arbitration, and prohibits any action being brought in respect matters actually submitted to arbitration, is collateral and dependent, and an award is not a condition precedent to action, cept as regards such sums as are not payable until the amount s been determined by the award: *Collins* v. *Locke* (1879), 4 p. Cas. 674; 48 L. J. P. C. 68.

In *Babbage* v. *Coulburn* (1882), 9 Q. B. D. 235; 51 L. J. Q. B. 8, it was held that under an agreement by a lessee to pay for lapidations, the amount, if disputed, to be settled by valuers, e valuation was a condition precedent to the lessor's right to e in respect of the dilapidations. Field, J., distinguished *Dawson Fitzgerald*, saying: "In that case the result was different, cause there was an independent covenant to pay a fair and asonable compensation, while here there is only a covenant to y a sum ascertained by valuers." The case was affirmed by A. (*diss.*, Cotton, L.J.), 46 L. T. 794.

In cases where the dependency arises from the nature of the venants, the following rule may be laid down:—

Dependency owing to nature of covenants.

Where covenant is sole consideration.

Where covenant is part of consideration and non-performance can be compensated for.

If *P* be the sole consideration for *D* (or, as it is sometimes expressed, goes to the root of the contract), P cannot bring his action without doing, or offering to do, *P*; in other words, the covenants are dependent; but if *P* be part only of the consideration for *D*, and the non-performance of *P* can be compensated by damages, P can bring

his action without doing, or offering to do, *P*; in other words, the covenants are independent.

This rule is laid down in the notes to *Pordage* v. *Cole* (1670) 1 Wms. Saund. 320, ss. 4 and 3 (ed. 1871, pp. 556 and 552), as follows: "Where the mutual covenants go to the whole considera tion on both sides, they are mutual considerations, and performance must be averred." "Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration."

The leading case on both branches of this rule is *Boone* v. *Eyre* (1777), 1 H. Bl. 273 n.; 2 W. Bl. 1312. There the plaintiff conveyed a plantation in the West Indies, with the negroes on it in consideration of a sum down and an annuity, and covenanted that he was lawfully possessed of the negroes. The defendant covenanted that, the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. To an action for non-payment of the annuity, the defendant pleaded that the plaintiff was not, at the time of making the deed, lawfully possessed of the negroes. On demurrer, Lord Mansfield, C.J., said (1 H. Bl. 273 n.): "The distinction is very clear: where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action."

"Covenants are to be construed as dependent or independent according to the intention of the parties and the good sense of the case": *per* Kennedy, L.J., in *Measures Bros., Ltd.* v. *Measures* [1910] 2 Ch. 248, at p. 262; 79 L. J. Ch. 707, applying *General Billposting Co.* v. *Atkinson*, [1909] A. C. 118; 78 L. J. Ch. 77.

Examples of dependent covenants.

Where the defendant covenanted to pay the plaintiff a certain sum, the plaintiff making to him a sufficient estate in certain land before St. Thomas's Day. *Held*, that the words "the plaintiff making," etc., were a condition precedent, *i.e.*, that the covenants were dependent: *Large* v. *Cheshire* (1672), 1 Vent. 147; 2 Keb. 801. See likewise *Duke of St. Albans* v. *Shore* (1789), 1 H. Bl. 270; *Atkinson* v. *Smith* (1845), 14 M. & W. 695; *Graves* v. *Legg* (1854), 9 Exch. 709; cases of assumpsit; and *Bradford* v. *Williams* (1872), L. R. 7 Ex. 259; 41 L. J. Ex. 164; where Martin, B., said: "

nk the words 'condition precedent' are unfortunate. The real estion, apart from all technical expressions, is, what in each tance is the substance of the contract."

Apprentice.

Where an apprentice ran away and enlisted as a soldier, it was d a sufficient excuse for his master not performing his covenant teach him: *Cuff* v. *Brown* (1818), 5 Price, 297; 19 R. R. 621; *ghes* v. *Humphreys* (1827), 6 B. & C. 680.

Where an auctioneer took an apprentice under a deed, in which described himself as an auctioneer, thereby impliedly repre-nting that he was licensed as an auctioneer, his failure to take t a licence avoided the deed: *Creaser* v. *Hurley* (1916), 32 L. R. 149.

Where a master leaves off his business he cannot bring an tion on the covenant by the apprentice to serve him: *Ellen* v. *pp* (1851), 6 Exch. 424; 20 L. J. Ex. 241; 86 R. R. 353.

Agreement to sing in an opera at £11 a week for three months, opera ran so long. Plaintiff was, through illness, unable to rform on the opening night. *Held*, her doing so was a condition ecedent to liability to engage: *Poussard* v. *Spiers and Pond* 876), 1 Q. B. D. 410; 45 L. J. Q. B. 621.

Condition on a season ticket for delivery up thereof on the day expiration. *Held*, a condition precedent to obtaining the return a deposit paid on the issue thereof: *Cooper* v. *L. B. & S. C. y.* (1879), 4 Ex. D. 88; 48 L. J. Ex. 434.

Bankers sold exchange contracts, *i.e.*, undertook to pay money exchange for silver, but stipulated that the goods in payment r which the money was required should be financed through em. *Held*, that financing the goods as stipulated was a con-tion precedent: *Bank of China* v. *American Trading Company*, 894] A. C. 266; 63 L. J. P. C. 92.

Where there has been part performance.

Even where the consideration goes to the root of the contract, defendant who has had a substantial part of the consideration nnot set up the non-performance by the plaintiff of a condition ecedent.

"Now whatever might have been the question if it had been ised while the agreement was executory, we are clearly of opinion at the defendant having received a substantial portion of the nsideration, it is no longer competent to him to rely upon the n-performance of that which might have been originally a ndition precedent: *per* Parke, B., in *Graves* v. *Legg* (1854), Exch. 709, at p. 716; *White* v. *Beeton* (1861), 7 H. & N. 42; L. J. Ex. 373; 126 R. R. 319; and see the judgment of the urt in *Ellen* v. *Topp* (*supra*), at p. 441. This doctrine is well d firmly established, and is in accordance with principles of mmon sense and justice": *per Curiam*, Cockburn, C.J., and

Quain and Field, JJ., *Carter* v. *Scargill* (1875), L. R. 10 Q. B 564, at p. 567.

Accordingly, it is impossible after a marriage to set aside th marriage contract on the ground of the failure of a pecuniar consideration : *Campbell* v. *Ingilby* (1856), 21 Beav. 567; on app (1857), 1 De G. & Jo. 393; 26 L. J. Ch. 654; 118 R. R. 145.

A breach of the covenant by an apprentice to serve his maste faithfully is no defence to an action against the master for no teaching him according to his covenant : *Winstone* v. *Linn* (1823) 1 B. & C. 460; 1 L. J. (o.s.) K. B. 126; 25 R. R. 455; *Phillips* v *Clift* (1859), 4 H. & N. 168; 28 L. J. Ex. 153; 118 R. R. 368.

Examples of independent covenants.

A covenanted with B not to interfere in a certain branch of th Scotch fish business, and to assign to B a certain Scotch fishery B. in consideration of the assignment and of A's covenant, cove nanted to pay A an annuity. *Held*, that the covenant not t interfere in the business was only a part of the consideration for th annuity, and was therefore not a condition precedent, but a independent covenant : *Carpenter* v. *Cresswell* (1827), 4 Bing. 409 1 M. & P. 66; 6 L. J. (o.s.) C. P. 27; 29 R. R. 587.

In a dissolution deed between two partners, A and B, assigned to B certain shares, and covenanted for further assurance and B covenanted with A to indemnify him against certai liabilities : on a suit by B to enforce A's covenant for furthe assurance, it was held that a breach by B of his covenant t indemnify A was no defence, for the covenants were independent *Gibson* v. *Goldsmid* (1854), 5 De G. M. & G. 757; 24 L. J. Ch. 279 104 R. R. 265; reversing 18 Beav. 584.

Covenant by lessee to deliver up a farm, and on quitting t deliver up an agreement. Covenant by lessor that if lessee di deliver up the farm and keep all other covenants, he would pa for manure. *Held*, that delivery up of the agreement was not condition precedent to liability to pay for the manure : *Newson* v *Smythies* (1858), 3 H. & N. 840; 28 L. J. Ex. 97; 117 R. R. 1001

The conveyances of plots forming part of a building estat contained covenants by the respective purchasers against buildin beyond either the front or rear building lines. In an action by purchaser of one plot against the purchaser of the adjoining plot t restrain a breach of the covenant as to the front building line *Held*, that the covenants were independent, and therefore th plaintiff's right to relief was not barred by a breach on his ow part of the covenant as to the rear building line : *Chitty* v. *Bra* (1883), 48 L. T. 860.

Engagement to sing in theatres, halls, and drawing-rooms fo fifteen weeks, and to be at rehearsals six days before engagemen began. *Held*, that the stipulation as to rehearsals was not

dition precedent: *Bettini* v. *Gye* (1876), 1 Q. B. D. 183; 45 J. Q. B. 209.

A covenant in a separation deed by the husband to pay an uity to a trustee for the wife, and a covenant by the trustee n the husband that the wife should not molest him, are indepen- t covenants: *Fearon* v. *Earl of Aylesford* (1884), 14 Q. B. D. ; 53 L. J. Q. B. 410.

Contracts to supply goods, and to pay for them are independent.

It will be observed that where A covenants to supply goods to and B covenants to pay for them, the effect of holding the formance by A of his covenant to be a condition precedent to right of action for the purchase-money, would be to prevent from recovering the purchase-money if he failed in delivering one article; while, if the covenants are held to be independent, an, if he is really injured by A's default, bring a cross action A's covenant; in cases of that nature consequently the cove- ts are held to be independent. The following are examples.

Examples.

Covenant by plaintiff with defendants, that he being provided defendants with rails and chairs, would complete part of the way and the permanent way before June 1; covenant by defen- ts with plaintiff to pay him £15,000 by instalments; provision t if the plaintiff should not complete the railway by June 1, defendants might retain part of the £15,000 for every day delay; defendants did not furnish the rails till after June 1. *d*, on an action for the £15,000, that the covenants were ependent; and the furnishing of the rails was not a condition edent: *Macintosh* v. *Midland Counties Ry. Co.* (1845), 14 & W. 548; 14 L. J. Ex. 338.

Agreement under seal that defendants should supply, and plain- purchase, all the coke required by plaintiffs for working their way; covenant by plaintiffs that so long as the defendants ld punctually supply the said coke they would abstain from chasing coke from other persons. *Held*, that the fact of the ntiffs having purchased coke from other persons was no answer an action brought by them against the defendants for not vering coke: *Eastern Counties Ry. Co.* v. *Philipson* (1855), . B. 2; 24 L. J. C. P. 140; 100 R. R. 592.

Plaintiffs contracted by deed with the Vestry of C to supply gas he public lanterns of the parish of C; covenanting (*inter alia*) they would to the satisfaction of the Vestry light each lamp unset and continue it lighted till sunrise, and also as to the ty and illuminating power of the gas. The Vestry covenanted, plaintiffs performing their covenants, to pay a certain sum per m for each gas lamp. On an action brought to recover the ey, the Vestry pleaded non-performance by the plaintiffs of covenants. *Held*, that the covenants by the plaintiffs and

defendants were independent: *London Gaslight Co.* v. *Chel Vestry* (1860), 8 C. B. (N.S.) 215.

Charter-parties.

See also *Ritchie* v. *Atkinson* (1808), 10 East, 295; 10 R. R. 30 *Havelock* v. *Geddes* (1809), 10 East, 555; 10 R. R. 380; *Davids* v. *Gwynne* (1810), 12 East, 380; 11 R. R. 420; *Storer* v. *Gord* (*supra*), p. 587; *Fothergill* v. *Walton* (1818), 8 Taunt. 576; 2 J. Moore, 630; 20 R. R. 567; *Stavers* v. *Curling* (1836), 3 Bing. N. 355; 3 Scott, 740; 2 Hodges, 237; 6 L. J. C. P. 41; 43 R. R. 6 (all cases on the construction of charterparties).

Clauses introduced by participles or the words "to be" creating a condition precedent.

A clause introduced by a participle, or by the words "to be may or may not be a mere qualification of the covenant with whi it is connected. In the former case it forms a condition precede to liability under the qualified covenant; in the latter it does n

The following are examples of clauses held to be conditio precedent.

The defendant covenanted to pay a certain sum to the plaint the plaintiff making him an estate in certain lands: *Large Cheshire* (1672), 1 Vent. 147.

Covenant by lessee to repair, "the lessor allowing and assigni timber for repairs": *Thomas* v. *Cadwallader* (1744), Willes, 49

"I think the only principle . . . which is useful to t question before us is that covenant is a matter of intention, a that any words will make a covenant, whether participial or n if it can be clearly seen that such was the intention of the parti A participial clause, therefore, such as that in this case, may be or a qualification of the previous covenants of the lessee, or it may a covenant by the lessor to perform what is mentioned in the clau If it be such a covenant, it may be also a qualification in the se that the lessor's performance of his covenant may be a conditi precedent to the lessee's obligation to perform his. In form days it seems to have been considered that a clause could not both a covenant and a qualification, but I think that is not the l now. The *dictum* of Amphlett, B., in *Treloar* v. *Bigge* (*a*), whi was cited as expressing a contrary opinion, is, I think, intended or to apply to the particular clause under consideration in that case *per* Pickford, L.J., in *Westacott* v. *Hahn*, [1918] 1 K. B. 495, p. 505; 87 L. J. K. B. 555.

Agreement by lessee to keep the premises in repair, "the sa being first put into good order and condition by the lessor *Neale* v. *Ratcliff* (1850), 15 Q. B. 916; 20 L. J. Q. B. 130; R. R. 844.

Plaintiff agreed to sell wool to the defendant, "the names of t vessels to be declared as soon as the wool was shipped." *He*

(*a*) (1874), L. R. 9 Ex. 151; 43 L. J. Ex. 95.

an action by the plaintiff for the price of the wool on the fendant refusing to accept it, that the declaring of the names of e vessels within a reasonable time after shipping the wool was a ndition precedent to the plaintiff's right to recover: *Graves* v. *gg* (1854), 9 Exch. 709.

Power to the lessee to determine the lease, "all arrears being id . . . without prejudice to any claim . . . which any of the rties hereto may then be entitled to for breach of any of the venants hereinbefore contained." *Held*, that the payment of rears was a condition precedent: *Grey* v. *Friar* (1854), 4 H. L. C. 5; 94 R. R. 246, followed in *Stait* v. *Fenner*, [1912] 2 Ch. 504; L. J. Ch. 710 and in *Burch* v. *Farrow's Bank, Ltd.*, [1917] Ch. 606; 86 L. J. Ch. 450. See also *Blore* v. *Giulini*, [1903] K. B. 356; 72 L. J. K. B. 114.

Lease with covenant by lessee to repair and deliver up, etc. oviso empowering lessee to determine the lease if (*inter alia*) he shall pay all the rent and perform and observe all the covenants." e proviso ended thus, "but without prejudice to the remedies either of the parties hereto against the other in respect of any tecedent claim or breach of covenant." The lessee gave notice d then began to do repairs, which were unfinished at the date e lease expired. *Held*, that the performance of the covenant repair was a condition precedent to the determination of the se, notwithstanding the words "without prejudice," etc.: *urch* v. *Farrow's Bank, Ltd.* (*supra*).

Lease with covenant by lessee to repair, the lessor having first t the same into repair pursuant to the covenant thereinafter tered into by him, with a covenant by lessor to put into repair rthwith. *Held*, that the performance of the lessor's covenant s a condition precedent: *Coward* v. *Gregory* (1866), L. R. 2 P. 153; 36 L. J. C. P. 1.

Covenant by lessee of house to pay rent and keep premises in pair; covenant by lessor that the lessee, on giving six months' tice before the end of the term, should have a renewed lease, upon paying the rent, and performing and observing the covenants of the lease." *Held*, that the performance of the covenants the lessee was a condition precedent to his privilege of having renewed lease: *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238; in the dgment of Kay, J., in this case all the prior cases are collected.

The following clauses have been held not to be conditions ecedent.

Such clauses creating independent covenants.

Covenant by lessor with lessee, "that he paying the rent and rforming the covenants on his part to be performed," shall ietly enjoy. In an action by the lessee for breach of covenant, e lessor pleaded that the lessee broke his covenants, and that

therefore the lessor's covenant ceased to oblige him. *Held*, demurrer, that the words "paying and performing" did n amount to a condition precedent: *Hayes* or *Hays* v. *Bickersta* (1676), 2 Mod. 34; Freem. K. B. 194; Vaugh. 118 (where t report is on the meaning of the covenant for quiet enjoymen *Allen* v. *Babbington* (1666), 1 Sidf. 280; 2 Keb. 9, 23; *Daws* v. *Dyer* (1833), 5 B. & Ad. 584; 39 R. R. 566; *Edge* v. *Boile* (1885), 16 Q. B. D. 117; 55 L. J. Q. B. 90.

Lease reserving the trees, covenant by lessee with the les that he should have liberty to fell the trees and root them u "repairing the hedges where they grow." *Held*, that the wor "repairing," etc., amounted to an independent covenant by t lessor: *Warren* v. *Arthur* (1683), 2 Mod. 317.

The defendant covenanted with the plaintiff that he, the pla tiff, "doing, fulfilling, and performing all the covenants in t indenture contained," he, the defendant, would pay an annuit *Held*, that "doing, etc.," was not a condition precedent to pa ment: *Boone* v. *Eyre* (1777), 2 W. Bl. 1312.

Covenant by X to do A or B. If he renders it impossible f him to do A, he is bound to do B: *McIlquham* v. *Taylor*, [189 1 Ch. 53; 63 L. J. Ch. 758; 64 L. J. Ch. 296.

CHAPTER XXXI.

QUALIFIED COVENANTS AND COVENANTS FOR TITLE.

ɔsolute Covenant qualified by Context: Covenants qualified by "but that, etc.": Inconsistent Absolute Covenants: Qualifying Words affect all Covenants in pari materia: Covenants for Title: Covenant for Title distinguished from Covenant for Quiet Enjoyment: Extent of Covenant for Title: Object of Covenant for Quiet Enjoyment: Disturbance necessary for Breach: What is a Disturbance: Legal Proceedings: Suit in Equity: Disturbance of Appurtenances: Construction of Particular Words: Disturbance caused by Covenantee's own act: Disturbance means Lawful Disturbance: Unless by Covenantor, or Specified Person: Who "claim under" the Covenantor: Covenant against Incumbrances: Covenant for Further Assurance: What Acts are within the Covenant: Whether Disentailing Deed can be Claimed: Duplicate Conveyance: Covenant to produce Deeds: New Covenants for Title: Original Conveyance void: Further Assurance distinguished from Estoppel.

THOUGH a covenant may be in terms absolute, it may appear om the whole deed that it was only intended to be a qualified venant, for—

Covenant qualified by context.

A covenant general or absolute in terms may be restricted or qualified by something appearing in another part of the deed.

Thus in a conveyance, covenants for title were restricted, by an reement in a remote part of the deed, to acts done by the venantor himself : *Brown* v. *Brown* (1662), 1 Lev. 57; and in a ase, a covenant by the lessee to repair at all times as occasion ould require, and at furthest within three months after notice, as held to be a covenant to repair only after occasion and three onths' notice : *Horsfall* v. *Testar* (1817), 1 J. B. Moore, 89.

A lease contained a covenant by the lessee for the payment of nt, and also of interest on it if it should be in arrear for three arters, and a covenant by a surety that the lessee should at all

times well and truly pay the rent at the respective days there before mentioned, and also interest, and should duly perform a the covenants, and that in case the lessee should neglect to pa the rent, etc., for forty days, the surety would pay it on deman *Held*, that the surety was not liable before the end of the fort days, nor before demand, the latter words restraining the former *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9; 18 R. R. 280.

In a separation deed, a covenant by the husband to pay a annuity of £250 to the wife during her life was restricted by recital that he had agreed to pay her an annuity of £250 out his salary as a searcher so long as he should hold the situation *Hesse* v. *Albert* (1828), 3 M. & Ry. 406; 32 R. R. 725.

In *Martyn* v. *McNamara* (1843), 4 Dr. & War. 411, Sugden, C seems to have been of opinion that the generality of a covena by A with X was qualified by a restricted covenant *in pari mater* by A and B with Y.

Ambiguous words.

It must, however, be remembered that an absolute covena will not be cut down by ambiguous words: Sugd. V. & P. (14 ed.), 605; and accordingly, where a vendor covenanted "that I was seised of a good estate in fee according to the indenture ma to him by W, his vendor," it was held that the covenant w absolute, and that the reference to the conveyance by W serv only to denote the limitation and quality of the estate, and n the defeasibility or indefeasibility of the title: *Cooke* v. *Foun* (1661), 1 Lev. 40; *S. C. sub nom. Cookes* v. *Fowns*, 1 Keb. 9

Conveyance by vendor as beneficial owner, since the Conve ancing Act, 1881, of his "estate term and interest under" a recit deed "in the piece of land coloured red in the plan" annexed such deed. *Held*, that the statutory covenant for title extende *quoad* the estate to that limited by the recited deed, and *quoad* t parcels to the whole land shown on the plan: *May* v. *Platt*, [190 1 Ch. 616; 69 L. J. Ch. 357. The Irish case of *Delmer* v. *McCa* (1863), 14 Ir. C. L. Rep. 377, which is apparently *contra*, is the treated as merely a decision on the words of the particular covena in that case.

Restrictive words rejected on the context.

Restrictive words may be altogether rejected if inconsistent wi another part of the covenant. Thus, in a case where, on d solution of partnership, B covenanted that, for and notwithstandi any act done by him, it should be lawful for A to receive certa moneys without any let, suit, or interruption of B, his executo or administrators, or any person claiming under him or them, was held that the words "for, etc.," being inconsistent with t subsequent parts of the covenant, ought to be rejected, and th the receipt of the money by B's executors was a breach: *Belch* v. *Sikes* (1828), 8 B. & Cr. 185; 6 L. J. (o.s.) K. B. 314.

"But that," etc.

The words "but that," etc., following a covenant, will be ıstrued as part of, and as a qualification of, the covenant.

The condition of a bond was that whereas the defendant had ;igned a lease for years to the plaintiff, he had not done any act disturb the possession of the plaintiff, whereby the assignment ght be impaired, hindered, or frustrated, but that the plaintiff ɔuld quietly hold and enjoy the same premises without any ;turbance by the defendant or any other person. *Held*, that the ɔrds "but that," etc., referred to the premises of the condition, d meant that the lease should be enjoyed without disturbance by y person or persons by act done or to be done by the defendant: *oughton* v. *Conway* (1564), Moore, 58; Dy. 240 a.

Covenant by lessor that he had not done any act to prejudice e lease, but that the lessee should enjoy it against all persons. *eld*, that the words "but that," etc., referred to the first words for any act done by the lessor, etc.": *Gervis* v. *Peade* (1598), o. Eliz. 615; *S. C. sub nom. Peles and Jervies' Case*, Dyer, 0 a, margin.

Where performance of both covenants is impossible, each is qualified.

If a deed contains two covenants, the performance of both of which is impossible, each of the covenants is a qualified covenant.

Thus where there was an agreement to pay plaintiff £25,000 by stalments for services connected with the formation of a railway, ıd another agreement that, if the railway should not be proceeded ith, it should be referred to arbitration to say what plaintiff should paid, it was held that the covenant for payment of the £25,000 as qualified: *Hemans* v. *Picciotto* (1857), 1 C. B. (N.S.) 646; ; L. J. C. P. 163; 107 R. R. 837.

Whether qualifying words in one covenant affect another covenant.

Where there are several covenants by the same covenantor, and ıe of them contains words restricting its generality, as, for stance, "notwithstanding any act of the covenantor," but the hers contain no such qualifying words, the question arises whether e restrictive or qualifying words apply only to the covenant in hich they are contained, or to the other covenants as well. It as formerly thought that if there was found in the first or last ırt of a sentence, or at the beginning of the first, or at the end the last, sentence a restrictive or qualifying clause, which in ɔod sense might be applied to both sentences, it should be so ɔplied; but that it was otherwise if the clause was placed in the iddle of one or two sentences; and the rule was stated to this fect in the judgment in *Gainsford* v. *Griffith* (1668), 1 Wms. ıund. 58 i, at p. 60 a (ed. 1871, p. 67); but the learned editor ere says: "It is questionable whether much regard would now

be paid to this mode of construction. The chief object of cour of law at present is to discover the true meaning of the partie and to construe the covenants accordingly. As far as the differen above laid down would tend to find out the intention of the partie so far it would now be adopted, and no farther." And the ru is expressly denied by Burrough, J., in *Nind* v. *Marshall* (1819 3 J. B. Moo. 703, at p. 720; 1 Brod. & Bing. 319, at p. 331; R. R. 610; *Howell* v. *Richards* (1809), 11 East, 633; 11 R. 287; *Foord* v. *Wilson* (1818), 8 Taunt. 543; 20 R. R. 554; *Ke* v. *Strong* (1845), 9 Ir. L. R. 74.

Lord St. Leonards' propositions.

Upon this subject Lord St. Leonards has laid down (Sugd. V. P. (14th ed.), c. 15, s. 3, pp. 605 *et seq.*), the four followi propositions, *viz.* :—

1. " Where restrictive words are inserted in the first of seve covenants having the same object, they will be construed extending to all the covenants, although they are distinct."

2. " Where the *first* covenant is general, a subsequent limit covenant will not restrain the generality of the preceding covena unless an express intention to do so appear, or the covenants inconsistent, or unless there appear something to connect t general covenant with the restrictive covenant, or unless there a words in the covenant itself amounting to a qualification."

3. " As, on the one hand, a subsequent limited covenant do not restrain a preceding general covenant, so, on the other, preceding general covenant will not enlarge a subsequent limit covenant."

4. " Where the covenants are of divers natures, and conce different things, restrictive words added to one shall not cont the generality of the others, although they all relate to the sa land."

Mr. Dart's criticism.

On these propositions Mr. Dart remarks (V. and P. (7th ed c. 13, s. 5, p. 799) that " the first . . . seems to be warranted the authorities. The second proposition is perhaps hardly accurat for though a prior general covenant will not, it appears, restrained by a subsequent limited covenant having a differe object, yet, where two covenants relate to the same object, restr tive words in the second may, it seems, control the generality the first. The third and fourth propositions seem to be uni peachable."

Mr. Rawle's view.

The view stated in Rawle on Covenants, p. 505, is as follows " The class of cases which may be said to be based upon *Brown* v. *Wright* (1799), 2 Bos. & Pul. 13; 5 R. R. 521, appear to deci that where the instrument contains one or more general unlimited covenants, which are connected with, or refer to, a have the same object as, one or more preceding limited covena

as to join the latter with the former, it will be inferred that the venantor intended that all the covenants should be restricted to s own acts or the acts of those claiming under him, and the eceding limited covenants will qualify and restrain the general es; in other words, when it clearly appears that the covenants e as it were cast in one mould, all having the same extent, Courts ll not pick out one of them in which the limitation is less rongly or distinctly expressed than in the others, and upon it sten on the covenantor a general liability. In the absence, how- er, of any such direct connection with or reference to each other would clearly lead to the above conclusion, when the limited venants belong to a different class, or rather, have a different ject from the unlimited ones, they will be held to produce no ect upon each other, and the former will not qualify the latter."

The following rule appears to include all Lord St. Leonards' opositions as amended by Mr. Dart, and also some cases which not fall under them, and to express Mr. Rawle's views.

Qualifying words restrict all covenants *in pari materia.*

If one covenant be restricted or qualified, all other covenants *in pari materia*, whether express or implied, are also restricted or qualified; but restrictive or qualifying words added to one covenant do not restrict or qualify other covenants, whether express or implied, *in dispari materia.*

In *Kean* v. *Strong* (1845), 9 Ir. L. R. 74, it was held by ampton, J., that an unqualified covenant to renew a lease was t cut down by a qualified covenant for quiet enjoyment, the venants not being connected with each other. His Lordship id (p. 82) : " It would be against principle to hold that an implied venant should qualify an express unqualified covenant, or that e distinct express covenant should qualify another express cove- nt neither grammatically nor substantially connected with the rmer. I cannot, therefore, yield to the argument which would alify the express unqualified covenant to renew by the terms the covenant for quiet enjoyment, a covenant which, in the deed, separated from the former by several distinct and independent venants : and, indeed, it may be added that two such covenants, e the covenant to renew, unqualified, and the other, the covenant r quiet enjoyment, limited to the acts of the covenantor, may ll and do often co-exist in the same deed." The case is reported appeal, *sub nom. Strong* v. *Kean* (1847), 10 Ir. L. R. 137.

The only case which does not support the rule is *Milner* v. *orton* (1824), McClel. 647, in which it was held that words stricting the covenant for quiet enjoyment also restricted the

covenants for title, and that case, it may be remarked, is al contrary to the second of Lord St. Leonards' propositions amended by Mr. Dart, and also to his fourth proposition, and expressly overruled by *Smith* v. *Compton* (1832), 1 L. J. K. 43; 37 R. R. 387; 3 B. & Ad. 189, where Lord Tenterden, C. (at p. 200), said: "We have considered *Milner* v. *Horton* aga since the argument, and we cannot feel ourselves bound by i authority." The case of *Line* v. *Stephenson* (1838), 6 Sco. 44 4 Bing. N. C. 678; 7 L. J. C. P. 263; 44 R. R. 819; on app. Sco. 69; 5 Bing. N. C. 183, where it was held that the expre covenant for quiet enjoyment restricted not only the implie absolute covenant to that effect created by the word "demise, but also the implied absolute covenant for title created by t same word, can hardly be considered as contravening the ru as the decision proceeds upon the ground that if the impli operation of the word "demise" is restricted at all, it must restricted for every purpose, and cannot be held to be restrict when implying a covenant for quiet enjoyment, and unrestrict when implying a covenant for title.

"Demise."

Examples of qualifying words applying to all covenants *in pari materia.*

Covenant that certain lands conveyed to the plaintiff for h jointure "are of a certain value, and shall so continue, notwit standing any act done or to be done by" the covenantor. *Hel* that the restriction applied to both covenants: *Rich* v. *Rich* (158 Cro. Eliz. 43.

Condition for bond to be void "if he were seised in fee the d of the obligation made of certain lands, and if said lands should discharged of all incumbrances made by him except the jointu of his wife." *Held*, that the words "except, etc.," applied to bo covenants: *Woodyard* v. *Dannock* (1600), Cro. Eliz. 762.

In a lease to two lessees, they "jointly and severally covenant in manner following, *viz.*": then followed a string of covenants respect of the working of a colliery; after these followed a covena by the lessor, and then a proviso "that it was thereby declar by and between the said parties," and the lessor covenant that the lessees might sell certain coal, they, the lessees (n saying "and each of them"), their executors, etc., paying a accounting to the lessor, etc. It was held that the implied covena to pay contained in the proviso was joint and several by reas of the introductory words, though a covenant by the lessor w interposed: *Duke of Northumberland* v. *Errington* (1794), 5 T. 522; 2 R. R. 666.

Examples of qualifying words not applying to covenants *in dispari materia.*

Covenant by lessee "that he would from time to time duri the term, after three months' monition, sufficiently repair, and the end of the term leave it sufficiently repaired." *Held*, that t clause to leave it well repaired at the end of the term was distin

l did not depend on the previous clause: *Harslet* v. *Butcher* 323), Cro. Jac. 644.

Covenants in a conveyance of a manor by A that he was seised fee notwithstanding any act done by him or any of his ancestors, l that no reversion was in the King or any other, and that the nor was then of a certain annual value, and that the plaintiff uld enjoy free from incumbrances by him or any of his ancestors. *ld*, that the covenant as to value was a distinct and unrestricted venant: *Crayford* v. *Crayford* (1628), Cro. Car. 106.

Covenants in conveyance by A that he was seised in fee notwithnding any act done by him, etc., and that the lands were of a tain annual value. *Held*, that the covenant as to value was absolute unrestricted covenant: *Hughes* v. *Bennet* (1638), Cro. r. 495; 1 W. Jo. 403.

Covenant to pay annuities and to indemnify against them. *ld*, two separate covenants, the former of which was broken by n-payment, though the vendor was not asked to pay them: *ward* v. *Anstey* (1825), 10 J. B. Moo. 55.

A covenant by a purchaser to indemnify the vendor from certain its was held not to be restricted by the covenant to pay them ing restricted to the time the purchaser was in possession: *ossfield* v. *Morrison* (1849), 13 Jur. 565; 7 C. B. 286; 18 L. J. P. 135; 78 R. R. 638.

Covenants for title.

The most usual opportunity for the application of the rule was the construction of the group of clauses contained in conveyances ior to 1882, which are usually, though inaccurately, called the venants for title. These consisted of (1) the covenant for title ictly so called (a covenant usually omitted), (2) the covenant right to convey, (3) the covenant for quiet enjoyment, (4) the venant against incumbrances, and (5) the covenant for further surance. Such covenants were either general or absolute, *i.e.*, ainst the acts, etc., of the whole world, and so extending to all ramount titles and incumbrances, or limited, *i.e.*, against the acts named persons, *e.g.*, the covenantor himself only, or the coventor and his ancestors, etc., and when so limited extended only defects of title or incumbrances created by such named persons. ch covenants are usually omitted from deeds executed since 82, as by section 7 of the Conveyancing Act, 1881 (now replaced sections 76 and 77 of the Law of Property Act, 1925, and Second Schedule to that Act), the appropriate covenants are emed to be included in conveyances, mortgages and settlements reason of the grantor being expressed to convey as beneficial ner or as settlor.

Covenant for title distinguished from

The covenants for title and for right to convey have the same object, but they have an object

covenants for quiet enjoyment and against incumbrances.

different from that of the covenants for qui enjoyment and against incumbrances.

In *Norman* v. *Foster* (1674), 1 Mod. 101; 3 Keb. 246, Hale, said: "If I covenant that I have a lawful right to grant, and th you shall enjoy, notwithstanding any claiming under me, these a two several covenants, and the first is general and not qualified the second. And so said Wylde, J., and that one covenant went the title, and the other to the possession."

"The covenant for title and the covenant for right to convey a indeed what is somewhat improperly called synonymous covenant they are, however, connected covenants, generally of the sa import and effect, and directed to one and the same object; a the qualifying language of the one may therefore properly enou be considered as virtually transferred to and included in the oth of them. But the covenant for quiet enjoyment is of a materia different import, and directed to a distinct object. The covena for title is an assurance to the purchaser that the grantor has t very estate in quantity and quality which he purports to conv . . . The covenant for quiet enjoyment is an assurance against t consequences of a defective title, and of any disturbances thereup For the purpose of this covenant and the indemnity it affords, is immaterial in what respects and by what means or by whose a the eviction of the grantee or his heir takes place: if he be lawfu evicted the grantor stipulates to indemnify him at all events. A it is perfectly consistent with reason and good sense that a cautio grantor should stipulate in a more restrained and limited man for the particular description of title which he purports to conv than for quiet enjoyment. He may suspect or even know that title is in strictness of law in some degree imperfect; but he may the same time know that it has not become so by any act of his ov and he may likewise know that the imperfection is not of such nature as to afford any reasonable chance of disturbance whate to those who should take under it; he may therefore very read take upon him an indemnity against an event which he consid as next to impossible, whilst he chooses to avoid a responsibility the strict legal perfection of his title to the estate, in case it sho be found at any future period to have been liable to some except at the time of his conveyance. He may have a moral certai that the existing imperfections will be effectually removed by lapse of a short period of time, or by the happening of cert immediately then impending or expectant events of death or like; but these imperfections, though cured so as to alleviate a risk of disturbance to the grantee, could never be cured by any s sequent event, so as to save the breach of his covenant for originally absolute and indefeasible title. The same pruden

erefore, which might require the qualification of one of these venants might not require the same qualification in the other of em, affected as it is by different considerations, and addressed to different object" : *per* Lord Ellenborough, C.J., *Howell* v. *chards* (1809), 11 East, 633, at p. 642; 11 R. R. 287.

Date from which Statutes of Limitation run.

"There is a distinction between the covenant for title and the venant for quiet enjoyment. The covenant for title is broken by e existence of an adverse title in another, as in this case by the ıse, its mere existence rendering the land of less value. The venant for quiet enjoyment is broken only when the covenantee disturbed, as in this case by the entry" : *per* Kelly, C.B., *Spoor Green* (1874), L. R. 9 Ex. 99, at p. 116; *Turner* v. *Moon*, [1901] Ch. 825; 70 L. J. Ch. 822; followed in *Great Western Railway* v. *sher*, [1905] 1 Ch. 316; 74 L. J. Ch. 241. The difference is ıterial when the measure of damages, and the date from which e Statutes of Limitation run, have to be considered : *Bunny* v. *opkinson* (1859), 27 Beav. 565; 29 L. J. Ch. 93; 122 R. R. 529; *oor* v. *Green* (1874), L. R. 9 Ex. 99; 43 L. J. Ex. 57; *Turner* *Moon*, *supra*.

"It is argued that a person against whom a statutory title is quired under the Statute of Limitations cannot be said to have ıde, done, executed, or omitted, or knowingly suffered anything thin the meaning of this covenant" (*sc.* for good right to con- y). "It is quite true that he cannot very well be said to have ne, made, executed, or knowingly suffered anything, but how n it be said that he has not omitted anything? The real reason ıy his title is extinguished is that, having a right of action against other, he has omitted to enforce such right for so long a period at the statute has run against him. It seems to me that this an omission within the covenant" : *per* Parker, L.J., in *Eastwood* *Ashton*, [1915] A. C., at p. 913; 84 L. J. Ch. 671.

Both covenants for title qualified.

The following cases are examples of both the covenant for title, ictly so-called, and the covenant for right to convey being alified by restrictive words in one of such covenants.

Restricted covenant for seisin, followed by absolute covenant for ht to convey. *Held*, that the latter covenant was qualified; for if he was seised in fee, he had a right to sell, and when by the st covenant he covenants against his own acts, it cannot be ended that immediately by another covenant to the same effect would covenant against all the world" : *Nervin* v. *Munns* (1683), Lev. 46.

Conveyance in fee with warranty against the vendor and his irs; qualified covenant by the vendor for seisin, followed by solute covenant for right to convey. *Held*, that the latter was alified : *Browning* v. *Wright* (1799), 2 Bos. & Pul. 13; 5 R. R.

Lord Eldon on covenants for title.

521. The remarks of Lord Eldon, C.J., as to the effect of co nants for title are most instructive. He says (at pp. 22 *et seq.* "It is certainly true that the words of a covenant are to taken most strongly against the covenantor; but that must qualified by the observation that a due regard must be paid the intention of the parties as collected from the whole conte of the instrument. . . . If a man purchase an estate of inheritan and afterwards sell it, it is to be understood, *prima facie*, th he sells the estate as he received it; and the purchaser takes t premises granted by him with covenants against his acts. If t vendor has taken by descent, he covenants against his acts a those of his ancestors; and if by devise, it is not unusual for h to covenant against the acts of the devisor as well as his ow In fact, he says: 'I sell this land in the same plight that received it, and not in any degree made worse by me.' It w argued that, if this were so, a man who has only an estate life might convey an estate in fee, and yet not be liable to the p chaser. This seems at first to involve a degree of injustice, but all depends on the fact, whether the vendor be really putting t purchaser in the same situation in which he stood himself. If has bought an estate in fee, and, at the time of the resale, has b an estate for life, it must have been reduced to that estate by own act, and in that case, the purchaser will be protected by t vendor's covenants against any act done by himself. But if t defect in his title depend upon the acts of those who had the est before him, and he honestly but ignorantly proposes to anot person to stand in his situation, neither hardship nor injustice c ensue. . . . *Prima facie*, in the conveyance of an estate of inhe ance, we are led to expect no other covenants than those wh guard against the acts of the vendor and his heirs. With resp to the conveyance of leasehold estates, this is not always so, a there is an obvious reason why this should not be so. Some of t cases rest on the distinction between freehold and leasehold p perty. . . . All the muniments of a freehold estate, and everythi which can illustrate the title, is in possession of the vendor; b this is seldom the case with respect to leaseholds. With reg to many estates it would be next to impossible to show anyth but the lease itself; the vendors could not produce the munime of their estates. It sometimes happens, therefore, that part require covenants in assignments of this kind of property wh are not required in conveyances of freehold; such as an absol covenant that the vendor holds a valid and indefeasible lease."

Vendor entitled by descent or devise.

Leaseholds.

Examples.

In the assignment of a lease the vendor covenanted that he h not done, etc., any act, etc., whereby, etc., the premises w incumbered, etc., and that for and notwithstanding any such a

c., the lease was valid, and that he had good right to assign. *eld*, that the covenant for right to assign was restricted : *Foord Wilson* (1818), 2 J. B. Moo. 592; 8 Taunt. 543; 20 R. R. 554.

In another assignment of a lease the covenants were that notithstanding any act of the assignor, the lease was valid; and rther that it should be lawful for the assignee to enter and enjoy uring the term without lawful disturbance by the assignor, his ecutors, administrators, or assigns, or any of them, *or any other rson or persons whomsoever*, having or lawfully claiming any tate, right, or interest in the premises, and that, free, etc., from l former and other gifts, etc., whatsoever made, done, or peritted by the assignor, his executors, and administrators. Then llowed a qualified covenant for further assurance. It was held *dissentiente* Park, J.) that the covenant for quiet enjoyment was ualified, not, as has been sometimes said, by the words in the her covenants, but by the concluding words "and that free," c., from all incumbrances created by the assignor himself : *Nind Marshall* (1819), 3 J. B. Moore, 703; 1 Brod. & B. 319; 21 . R. 610. This case is discussed in Platt, Cov. 373; Rawle, ov. 509.

L, being entitled to a term of eleven years if C should so long ve, by indenture reciting the demise to him for eleven years, but ot stating the term to be determinable on C's death, assigned the rm to S, habendum for eleven years, and covenanted with S that, otwithstanding any act by him done or knowingly suffered or nitted, the lease was valid, and that the same, and the term of even years therein expressed were respectively in full effect, and no wise become void, etc., otherwise than by effluxion of time, nd also that for and notwithstanding any such act, etc., he had ght to assign, with a covenant for quiet enjoyment during the rm without disturbance by L or any one rightfully claiming rough him. C was dead before the date of the assignment. *Held*, at the covenant that the lease and term were in full effect was stricted to the acts of the vendor, etc.; and therefore that the termination of the term by the death of C was not a breach : *tannard* v. *Forbes* (1837), 6 Ad. & E. 572; 1 Nev. & Per. 633; L. J. K. B. 185; 45 R. R. 564.

In *Nokes' Case* (1599), 4 Rep. 80 b; *S. C. sub nom. Nokes* v. *mes*, Cro. Eliz. 674; *Merrill* v. *Frame* (1812), 4 Taunt. 329; 13 . R. 612; and *Line* v. *Stephenson* (1838), 6 Sco. 447; 4 Bing. . C. 678; 7 L. J. C. P. 263; 44 R. R. 819; 7 Sco. 69; 5 Bing. . C. 183; an express covenant for quiet enjoyment was held to ualify the generality of the covenant to the same effect implied the word "demise." "Demise."

On the other hand, it has been held that the generality of a

Covenant for quiet enjoyment not qualified.

covenant for quiet enjoyment was not restricted by a qualifi covenant for title : *Howell* v. *Richards* (1809), 11 R. R. 287; East, 633 (where Lord Ellenborough, C.J., said (at p. 643) : " looking at the case of *Browning* v. *Wright* " (1799), 2 Bos. & Pu 13, " in which almost all the cases on the subject are collected a considered, I do not find any case in which it is held that t covenant for quiet enjoyment is all one with the covenant for titl or parcel of that covenant "); *Young* v. *Raincock* (1849), 7 C. 310; 18 L. J. C. P. 193; 78 R. R. 652; and that the generality the covenant for title was not restricted by a qualified covenant f quiet enjoyment : *Norman* v. *Foster* (1674), 1 Mod. 101; *Smith* *Compton* (1832), 3 B. & Ad. 189; 1 L. J. K. B. 43; 37 R. R. 38 So a covenant in the assignment of a lease that the lease w good was not restricted by a qualified covenant for quiet enjo ment : *Gainsford* v. *Griffith* (1668), 1 Wms. Saund. 58 i; 2 Ke 76, 201, 213; 1 Sidf. 328; or by qualified covenants against incu brances, for quiet enjoyment, and further assurance : *Barton* *Fitzgerald* (1812), 15 East, 530; 13 R. R. 519; and a covenan in the assignment of a share in a patent, for right to assign w not restricted by a subsequent covenant " that he had not b any means, directly or indirectly, forfeited the right or authori that he might have over the same " : *Hesse* v. *Stevenson* (1803 3 Bos. & Pul. 565; 44 R. R. 880.

In *Trenchard* v. *Hoskins* (1628), Winch. 91, Litt. Rep. 62, 6 185, 203, the covenants were that the vendors were seised in fe and that they or one of them had good right to convey, and th there was no reversion or remainder to the King by any act do by them. Notwithstanding the statement in Platt on Covenant 376, that it is doubtful how the case was decided, citing 1 Wm Saund. 60, n., and 1 Sidf. 328, it appears that the decision c appeal (1629) (Litt. Rep. 203) was for the plaintiff, *i.e.*, that t qualifying words did not restrain the first covenants.

Extent of covenant for right to convey.

A covenant for right to convey extends bot to the covenantor's title, and to his capacity t convey.

A covenant by a husband that he and his wife had good rig to convey was broken by her being under age : *Nash* v. *Ashto* (1683), T. Jo. 195.

The usual qualified covenant for right to convey, *i.e.*, qualifie so as to extend only to the acts of the grantor and persons throug whom he claims otherwise than by purchase, is not broken by t grantor having given an acknowledgment of an encroachment upo or of having opened windows which get light from, adjoining land.

Acknowledgment given for lights, etc.

Action on the usual qualified covenant for good right to convey otwithstanding any act, etc., done or permitted to the contrary the vendor or any person or persons claiming through, under, or trust for him." Prior to the conveyance the defendant had led down an old house and built a new house on the land, to ch he had a good title, but in building the new house he roached upon the adjoining premises and made the cornice and uts to his house project over his neighbour's land, and also put new lights overlooking it. In respect of the land overhung by cornice and spouts the defendant had no title, and the neighbour ed upon the defendant to acknowledge the encroachment, which did, and entered into an agreement to pay 5s. a year so long as cornice, spouts and windows should be used by him. *Held*, t such agreement was not a breach of the covenant. "The ration of a qualified covenant for title is well known, and has n established by a series of cases, and I do not feel myself ified in departing from the construction established by those isions. Upon a sale of real property it is for the purchaser to rtain what the title of the vendor is, and to satisfy himself that has a good title. The vendor then makes a conveyance, and ally covenants that he has done no act to affect or derogate n his title. If the vendor had no title at all to the property veyed there would be no breach of such a covenant. It is said because the defendant acknowledged the encroachment and le an agreement with the owner of the adjoining premises to an annual sum in respect of it, those two facts constitute a ach of the covenant; but neither of those acts was any thing ch rendered the defendant's title worse than it was originally": Erle, C.J., *Thackeray* v. *Wood* (1865), 6 B. & S. 766, at p. 773; L. J. Q. B. 226; 136 R. R. 559.

A granted a lease of certain lands to B for a term of 99 years. ortgages the lands so leased by sub-demise. Subsequently B as eneficial owner" purported to surrender to A the whole of the esaid lands to the intent that the residue of the term of 99 years all other the estate and interest of B in the lands might be ged and extinguished in the reversion and inheritance of the premises. In course of time A "as beneficial owner" pured to convey to B part of the above-mentioned lands in fee, A g throughout unaware of the existence of the mortgage subs. B conveys the lands last mentioned to C, entering into ess covenants with C that he, B, had good right to convey, for enjoyment, free from incumbrances, and for further assurance. ventually mortgages the premises contained in the lastioned transaction to D, who, in the events which happened, ired the equity of redemption of the same. In an action by

D against A, *held* (*inter alia*), that A's conveyance as " benefi owner " was a breach of his implied covenant against the acts omissions of persons claiming through him, A, the mortgage s terms being in the nature of incumbrances " made by a per rightfully claiming through the defendant " : *David* v. *Sal* [1893] 1 Ch. 523; 62 L. J. Ch. 347.

In regard to the covenant for title implied by section 7, s section (1) (A) of the Conveyancing Act, 1881 (replaced by Part Second Schedule of the Law of Property Act, 1925), Lord H worth, M.R., says : " It is important to observe that for a cert number of years—perhaps ever since the Conveyancing Act in force—it has been held that that covenant which is so impl is a limited covenant. It is not an all-embracing covenant fr which there are exceptions, but it is a qualified covenant " : *Sto* v. *Eastbourne Rural Council*, [1927] 1 Ch. 367, at p. 390; L. J. Ch. 312.

Object of covenant for quiet enjoyment.

A covenant for quiet enjoyment is a covena to secure the possession of the covenantee.

Accordingly the covenant is broken if the property be in lea so that the covenantee cannot obtain possession : *Ludwell Newman* (1795), 6 T. R. 458; 3 R. R. 231; but the covenant not a covenant guaranteeing that the covenantee may use the la in any manner he pleases. Thus, where a lessor, who had bou property subject to a restrictive covenant not to carry on the tra of a beer seller, leased a part of it without any such restriction, a the lessee opened a public house, but was restrained by injunct at the suit of his lessor's vendor, it was held, in an action by lessee for breach of the covenant for quiet enjoyment, that th was no breach, as the covenant did not amount to a warranty the lessee that he might use the property for any purpose he pleas and this, though certain other trades were expressly excepte *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 316, where the Co said (at p. 326) :—" There can be no doubt that a proceeding the Court of Chancery or of a Court of common law, interfer with the title and possession of the land, does amount to a brea of the covenant for quiet enjoyment, as in the case of dow common, rent, or such like : *Calthorp* v. *Heyton* (1676), 2 M 54; *Hunt* v. *Danvers* (1680), T. Raym. 370. On the other ha it has long been settled that such a proceeding, interfering o with a particular mode of enjoyment of the land, or part of but not with the title or possession, is not a breach : *Morgan Hunt* (1690), 2 Vent. 213."

Legal proceedings.

But in *Sanderson* v. *Mayor, etc., of Berwick* (1884), 53 L.

B. 559; 13 Q. B. D. 547, at p. 551, in the written judgment the Court of Appeal, it is said :—" We have not lost sight of e observations on the nature of such a covenant which were made Willes, J., in *Dennett* v. *Atherton*. But it appears to us to be every case a question of fact, whether the quiet enjoyment of e land has or has not been interrupted, and where the ordinary and wful enjoyment of the demised land is substantially interfered with the acts of the lessor, or those lawfully claiming under him, the venant appears to us to be broken, although neither the title to e land nor the possession of the land may be otherwise affected."

"The words 'any person claiming under the lessor' were terpreted by Lord Esher to mean a person claiming under him *e.*, the lessor) the right to do the acts which caused the interrupon. . . . Lord Esher's interpretation is in my opinion the correct e": *per* Bray, J., in *Williams* v. *Gabriel*, [1906] 1 K. B. 155, pp. 157—8; 75 L. J. K. B. 149; and see cases cited.

Disturbance necessary.

But "in all cases where any person hath title the covenant (for iet enjoyment) is not broken until some entry or other actual sturbance be made by him upon his title": Shep. Touch. 171, opted by Brett, M.R., in *Howard* v. *Maitland* (1883), 11 Q. B. D. 5, at p. 701. In that case, in a conveyance of land by the fendant to the plaintiff, the defendant covenanted for title and iet enjoyment, notwithstanding any act or thing done or suffered him, or any of his ancestors or predecessors in title. After the nveyance, a decree was made in a suit in chancery, in which the aintiff in the action, though not a party to the suit, was presented, being one of a class of persons against whom the suit s brought, and by the decree the land conveyed by the defendant s declared to be subject to a general right of common over it; was held that the decree alone, without any entry or actual turbance of the plaintiff in his possession, was no breach of the endant's covenant for quiet enjoyment. But Brett, M.R., said t if, after that decree, anybody had brought an action against plaintiff for interfering with the right of common, he would ve had no defence, and he was not prepared to say that judgment overed in such an action might not have been a disturbance.

Suit in equity.

It used to be thought that a suit in equity was not a disturbance hin the meaning of the covenant, on the ground that a Court of could not recognise proceedings in equity; but it is now decided t a suit in equity, by which the covenantee is disturbed, is a turbance within the meaning of the covenant: *Selby* v. *Chute* 13), 1 Moore, 859; Brownl. & G. 23 (this report is wrong; see Raym. 371); *Calthorp* v. *Heyton* (1676), 2 Mod. 54; *Hunt* v. *ivers* (1680), T. Raym. 370; *Morgan* v. *Hunt* (1690), 2 Ventr.

Examples of disturbance.

The excavation of quarries in land over a demised mine, where water percolates into the demised mine, is a breach of the co nant for quiet enjoyment: *Shaw* v. *Stenton* (1858), 2 H. & 858; 27 L. J. Ex. 253; 115 R. R. 854; but the flooding of a mi not caused by any direct act of interruption, or by any act t consequences of which were or ought to have been foreseen the time the covenant was entered into, is not a breach: *Harris* v. *Muncaster*, [1891] 2 Q. B. 680.

The lessor is liable for damage caused by the proper user, by t lessee of adjoining land of the lessor, of drains passing through t demised land whereby water escaped on to the demised land, t drains having been imperfectly constructed: *Sanderson* v. *May of Berwick* (1884), 13 Q. B. D. 547; 53 L. J. Q. B. 559; and f inconvenience caused by the lessor's painting a demised house pursuance of a covenant in that behalf: *Budd-Scott* v. *Danie* [1902] 2 K. B. 351; 71 L. J. K. B. 706; but is not liable for inju to a particular class of goods used in a trade for which part house was let, by the reasonable and ordinary use of the remainc of the house: *Robinson* v. *Kilvert* (1889), 41 Ch. D. 88; nor f building up an adjoining house so as to make the lessee's chimne smoke: *Davis* v. *Town Properties Investment Corporation*, [190 1 Ch. 797; 72 L. J. Ch. 389; dissenting from *Tebb* v. *Cave*, [190 1 Ch. 642; 69 L. J. Ch. 282; and see *Harmer* v. *Jumbil*, [192 1 Ch. 200, at p. 213; 90 L. J. Ch. 140.

A consideration of the true limits and extent of a covenant f quiet enjoyment and of the cases bearing on the same is to found in the judgment of Scrutton, J., in *Jones* v. *Consolidat Anthracite Collieries, Ltd., and Lord Dynevor*, [1916] 1 K. 123, at pp. 136—7; 85 L. J. K. B. 465.

A nuisance committed by the lessor on his adjoining land is n a breach of the covenant for quiet enjoyment: see *per* Kekewich, *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71, at p. 76; 58 L. J. C 124; applied in *Phelps* v. *City of London Corporation*, [191 2 Ch. 255; 85 L. J. Ch. 535.

Disturbance must be by act done after covenant entered into.

The disturbance must be caused by some act done after t grant of the lease. The owner of a house let it off in floors, a water for each floor was conveyed thereto from a cistern by mea of a main pipe and a branch therefrom on each floor. A bran pipe burst on an upper floor and flooded the plaintiff's floor a injured his goods. *Held*, that the lessor was not liable on covenant for quiet enjoyment because "after the lease had be granted there was no breach of any duty, there was no act of eit commission or omission, and no negligence. . . . The covena being prospective no breach of it was committed. In the ca which have been cited to us (*viz.*: *Andrews* v. *Paradise* (172

Mod. 318; *Shaw* v. *Stenton* (*supra*); and *Calvert* v. *Sebright* . *Sebright* (1852), 15 Beav. 156; 92 R. R. 361), an authority to o an act had been given by the lessor before the granting of the ease, and afterwards an act had been done pursuant to that uthority. . . . It was, therefore, an act for which the lessor was esponsible . . . and the act was done during the enjoyment by he lessee" : *per* Brett, L.J., *Anderson* v. *Oppenheimer* (1880), Q. B. D. 602, at p. 607; 49 L. J. Q. B. 708. In the somewhat imilar case of *Blake* v. *Woolf*, [1898] 2 Q. B. 426; 67 L. J. Q. B. 13, the judgment does not turn on the liability under the covenant or quiet enjoyment, which is not mentioned.

"There seems no logical or other reason for putting an act of mission into a different category from that of an act of commission, particularly where you find there was a duty which lay upon he person sought to be made responsible" : *per* Pollock, M.R., n *Booth* v. *Thomas*, [1926] 1 Ch. 397, at p. 403; 95 L. J. Ch. 60.

"I apprehend there is no authority and no principle for holding landlord liable under a covenant for quiet enjoyment—that is to ay, that he has done anything which renders him liable to lamages under the covenant in respect of quiet enjoyment—merely ecause he knows of what is being done and does not take any steps o prevent what is being done. There must be something much nore than that. There must be something which can fairly amount o his doing the act complained of or allowing the act complained of ither by actual participation by himself or his agents, or by vhat Lord Collins called active participation in that which was omplained of" : *per* Cozens-Hardy, M.R., in *Malzy* v. *Eichholz*, 1916] 2 K. B. 308, at p. 315; 85 L. J. K. B. 1132.

Unless expressly extended.

But the covenant may be so worded as to extend to past acts. Thus, where a man in 1666 covenanted for quiet enjoyment for ine years from 1664, a plea that the lessee had not been disturbed *b et post* the sealing of the indenture was held bad : *Lewis* v. *Iellior* or *Helliar* (1668), 2 Keb. 291, pl. 73; 377, pl. 38.

Things appurtenant, etc.

The covenant for quiet enjoyment extends to everything that is ppurtenant or incident to the grant to which it relates : *e.g.*, a ight of way of necessity over the covenantor's other ground : *ndrews* v. *Paradise* (1724), 8 Mod. 318; *Morris* v. *Edgington* 1810), 3 Taunt. 24; 12 R. R. 579; but it does not extend the peration of the grant. Thus, in *Leech* v. *Schweder* (1874), L. R. Ch. 463; (43 L. J. Ch. 487), where there was a lease with an rdinary covenant for quiet enjoyment, Mellish, L.J., said (at . 474) : "The covenant for quiet enjoyment does not increase r enlarge the rights which were granted by the previous part of he conveyance," and it was accordingly held that the covenant

for quiet enjoyment gave no further right to an access of lig than the lessee had under the demise.

A father and his eldest son created a number of mortgages exercise of a joint power reserved to them by a disentailing assu ance and of other powers. Each mortgage contained a joint a several covenant by father and son for quiet enjoyment, " a that free and clear and freely and clearly acquitted and exonerat released and discharged or otherwise " by the mortgagors, et The father was empowered by his own marriage settlement ma many years before the disentailing assurance to appoint by de or will a sum of £10,000 as portions for the younger children his marriage additional to a certain other sum for the same purpo which had been protected by a long term of years. The fath died some years after the execution of the last of the mortga deeds, having appointed the £10,000 by his will, and charged t settled estates with the same in addition to the sum to be rais under the trusts of the term. *Held* (*inter alia*) that the operati of the security of the mortgagees was not enlarged by the covena for quiet enjoyment: *Nottidge* v. *Dering*, [1910] 1 Ch. 297; L. J. Ch. 439.

"During the term."

Covenant that lessee should hold land " during the term, " without interruption, and discharged from tithes," and furthe " if the tithes were recovered against him *during the term*," recoup him. *After the term*, an action was brought against t lessee for tithes which had accrued due *during the term*. *Hel* that this was within the words of the covenant: *Lanning Lovering* (1602), Cro. Eliz. 916.

In *Evans* v. *Vaughan* (1825), 4 B. & C. 261; 6 Dow. & Ry. 34 3 L. J. (o.s.) K. B. 213; 28 R. R. 250, where a tenant for li demised for a term of years, it was held that the words " duri the said term " meant during the term which the lessor purport to grant, and not merely a term determinable on the death of t lessor.

"Acts."

"Means."

" The word ' acts ' means something done by the person agai whose acts the covenant is made, and the word ' means ' has similar meaning, something proceeding from the person covena ing," or the person against whose acts the covenant is mad *Spencer* v. *Marriott* (1823), 1 B. & C. 457, at p. 459; 2 D. & R 665; 1 L. J. (o.s.) K. B. 134; 25 R. R. 453. In that case, t mesne lessor omitted to inform her lessee that there was a clau in the original lease prohibiting the carrying on of trade, and t lessee underlet to a tenant who was evicted for doing so. This w held to be no breach of the mesne lessor's covenant against evicti by or from her or by or through her acts, means, right, tit

rfeiture, privity, or procurement. To the same effect is *Dennett* . *Atherton* (1872), L. R. 7 Q. B. 316.

But if a lessee, subject to a condition of re-entry on non-payment rent, underlets and covenants for quiet enjoyment "without the npeachment of him or of any other occasioned by his impediment, nterruption, means, procurement, or consent," and the sub-lessee ejected for default of his lessor in paying the rent reserved by ne original lease, this is a breach of the covenant: *Stevenson* v. *owell* (1612), 1 Bulstr. 182.

"Means and procurement."

But "'means and procurement' have a large extent" (Palmer, 40); so that in *Butler* v. *Swinnerton* (1622), 2 Roll. Rep. 286; alm. 338; Cro. Jac. 656, where a husband procured a conveyance o himself and his wife, remainder to his heirs, it was held that the ife claimed "by the means" of the husband, "although she laimed by title derived from another."

"Neglect" and "default."

"A *neglect* and a *default* seem to imply something more than ne mere want of discretion with respect to his [*i.e.*, the covenanor's] own interests; something like the breach of a duty or legal bligation existing at the time; these words, in their proper sense, nplying the not doing some act to secure his title which he ought o have done, and which he had the power to do; and the not reventing or avoiding some danger to the title, which he might ave prevented or avoided": *per* Tindal, C.J., *Woodhouse* v. *enkins* (1832), 9 Bing. 431, at p. 441; 2 Moo. & Sc. 599, at . 615; 2 L. J. C. P. 38; 35 R. R. 591, in which case a lessee, ho held under a lease granted by a tenant for life and remainderan in tail with notice of their title, granted an underlease with covenant against ejectment by him, his heirs, executors, etc., or by any other person or persons lawfully claiming or to claim y, from, or under him, them, or any of them, or by his, their, r any of their acts, means, consent, neglect, default, privity, or rocurement"; the underlessee was ejected by a remainderman n fee, the tenant in tail having died without issue. *Held*, that he covenant was not broken. "No *act* is done by the lessor; o *consent* is given to the eviction; there is no *privity*, no *prourement*": *per* Tindal, C.J., 9 Bing., at p. 441.

"Default."

There is a dictum of Lord Loughborough, C., in *Lady Cavan* . *Pulteney* (1795), 2 Ves. Jun. 544; 3 R. R. 8; (1797), 3 Ves. 84, to the effect that a lessor who, reciting that he was seised in ee, covenanted for quiet enjoyment against himself, or by his efault, etc., and who always had it in his power by an easy act, s suffering a recovery, to make himself owner of the land which e leased, would be liable as for his default if he neglected to do o and his tenants were ejected by the remaindermen; on which Lord St. Leonards observes (Sugd. V. & P. (14th ed.), p. 603)

that "The ground of this opinion must have been that t eviction was owing to the *default* of the lessor in not sufferi a recovery."

Quit rents accrued before conveyance to purchaser.

Covenant, in conveyance in fee, for quiet enjoyment, "witho any action, etc., by" defendant, or those claiming under him, by or through his or their "acts, means, *default*," etc. *Hel* that a breach was well assigned in respect of certain quit rents arrear at the time of the conveyance, though not stated to ha accrued while the covenantor was owner of the premises, on t ground that it was owing to his "default" that they remain unpaid: *Horres* v. *Brushfield* (1803), 3 East, 491.

Lord St. Leonards observes on this case (Sugd. V. & (14th ed.), p. 602) that the argument of the Court would apply to mortgage or any other incumbrance created by a former own and adds a caution as to applying this decision to cases arisi in practice.

Rents.

It has been held that a covenant for quiet enjoyment "and th clearly acquitted of and from all grants, etc., rent-charges," et extends to a quit rent payable to the lord of the manor *ratio tenurae*, although not in arrear at the time of conveyance, "for quit rent is a rent": *Hammond* v. *Hill* (1709), Comyns, Rep. 180

"Permit and suffer."

"The words 'permitting and suffering' do not bear the sa meaning as 'knowing of and being privy to'; the meaning of the is that the defendant [the covenantor] should not concur in a act over which he had a control": *per* Bayley, J., and "t covenant extends to such permissive acts only as have, throu the permission, an operative effect in charging the estate": *p* Holroyd, J., *Hobson* v. *Middleton* (1827), 6 B. & C. 295, at pp. 3 and 304; 9 D. & R. 249; 5 L. J. (o.s.) K. B. 160, where it was he that a covenant by the vendor's dower trustee, that he had n "permitted or suffered," etc., was broken by his having previous conveyed his estate away, but not broken by his being a party to conveyance whereby the vendor made a mortgage.

"Suffer."

But where a lessor was bound to "suffer" his lessee to enjo "and that without interruption by himself or any other," it w held that an entry on the lessee under an elder title was no brea unless the lessor actually procured the disturbance: *Anon.* (156 Dy. 255 a, pl. 4.

"Suffer," charging order.

In *Roffey* v. *Bent* (1867), L. R. 3 Eq. 759, Lord Romilly, M.R said, "the word 'suffer' . . . may, undoubtedly, be used in active sense; but when the words 'shall do or suffer any act' used, it is to be understood as meaning to endure or sustain, a to apply to something being done *in invitum*"; and consequent held, that a charging order on a fund was an act suffered by person, who thereby lost his interest in a fund.

A covenant by defendant to permit the plaintiff to sow clover among the defendant's barley is not broken by the defendant owing his barley without notice to the plaintiff, for the defendant does not thereby prevent the plaintiff from also sowing : *Hughes* v. *Richman* (1774), 1 Cowp. 125.

"Permit."

"The railway company are liable under this covenant" (*sc.*, for quiet enjoyment) "on the ground that it is a covenant the benefit of which runs with the land in favour of the assigns of the lease, and the burden of which runs with the reversion and affects the assigns of the reversion" : *per* Chitty, L.J., in *Manchester, Sheffield and Lincolnshire Ry.* v. *Anderson*, [1898] 2 Ch. 394, at p. 402; 67 L. J. Ch. 568.

Benefit of covenant for quiet enjoyment runs with land and burden with reversion.

A covenant for quiet enjoyment is not broken when the disturbance, etc., is the natural consequence of the covenantee's own act or default.

Disturbance caused by covenantee's own act is not a breach

"All the judges agreed that when a man binds himself and his heirs to warranty, they are not bound to warrant new titles of actions accruing through the feoffee or any other after the warranty made, but only such titles as are *in esse* at the time of the warranty made. . . . And also here the heir, who is executor and plaintiff in this action, is the cause of the breach of the condition, whereof he shall not himself take advantage so as to give himself an action by his own act" : *Executors of Grenelife* v. *W*—— (1539), Dy. 42 a, at p. 42 b. The action in this case was on the warranty on the sale of a copyhold, and the lord entered for rent falling due after the sale. See to the same effect, *Anon.* (1537), Dyer, 30 a, where the covenant was for enjoyment "without interruption of any one."

The defendant leased a house to the plaintiff with an absolute covenant for quiet enjoyment. *Held*, that by obtaining an injunction against the plaintiff for ploughing up meadows the defendant had not broken his covenant. This case appears to have been decided on the ground that the disturbance was not in estate or title : *Morgan* v. *Hunt* (1690), 2 Vent. 213.

The word "disturbance" in the covenant for quiet enjoyment means lawful disturbance only, unless (i) by the covenantor himself, or (ii) a person specially named.

Disturbance means lawful disturbance.

Of course the covenant may be so worded as to extend to tortious disturbances : *e.g.*, "against all claiming *or pretending to claim* any right" : *Chaplain* v. *Southgate* (1717), 10 Mod. 384;

Covenant extended to tortious disturbances.

S. C. sub nom. Southgate v. *Chaplin*, 1 Com. Rep. 230; *Hunt* v *Allen* (1622), Winch. 25.

Recital.

A recital may show that the covenant is intended to apply to th acts of a particular person : *Perry* v. *Edwards* (1720), 1 Stra. 400.

Mr. Preston (Shep. Touch. 166) says : " It is now settled that general warranty of title or enjoyment, extends only to evictions b persons having title, while a covenant for enjoyment withou eviction by persons particularly named, is a warranty again wrongful as well as rightful entries, etc."

" When a man covenants his lessee shall enjoy his term again all men, he doth neither expressly covenant for his enjoymen against tortious acts, nor doth the law so interpret his covenant " *Hayes* v. *Bickerstaff* (1670), Vaugh. 118, at p. 123.

" The rule has, I think, been correctly stated at the bar, tha where a man covenants to indemnify against all persons, th is but a covenant to indemnify against lawful title; and the reaso is, because as it regards such acts as may arise from rightfu claim, a man may well be supposed to covenant against all th world; but it would be an extravagant extension of such a covenan if it were good against all the acts which the folly or malice strangers might suggest; and therefore the law has proper restrained it within its reasonable import, that is, to rightful titl It is, however, different where an individual is named, for there th covenantor is presumed to know the person against whose acts h is content to covenant, and may, therefore, be reasonably expecte to stipulate against any disturbance from him, whether by lawf title or otherwise " : *per* Lord Ellenborough, C.J., *Nash* v. *Palm* (1816), 5 M. & S. 374, at p. 379; 17 R. R. 364.

A leased for years, with a clause of warranty. The lessee wa ousted by one who had no right. *Held*, that the lessee could no maintain covenant against the lessor, for he was ousted by wron and had his remedy by trespass or ejectment against the man wh ousted him, but if he be ousted by title paramount, then as he ha no remedy against the person ousting him, he would have a remed against the lessor by the warranty : Y. B. 26 Hen. 8 (1534), 3 cited 2 Wms. Saund. 177 a (ed. 1871, vol. 2, p. 525).

Examples.

The following are examples :—Y. B. 22 Hen. 6 (1443), 5 pl. 26, cited *Dudley* v. *Folliott* (1790), 3 T. R. 584, at p. 587 (note 1 R. R. 772; *White* v. *Ewer* (1601), Cro. Eliz. 823; *Chantflower* *Priestly* (1602), Cro. Eliz. 914; *S. C. sub nom. Chanudflower* *Prestley*, Yelv. 30; *sub nom. Chandflower* v. *Waterhouse a Presbye*, Noy. 50; *Kirby* v. *Hansaker* (1612), Cro. Jac. 315; *Tisda* v. *Essex* (1616), Hob. 34; Moore, 861; 1 Roll. Rep. 397; *Broki* v. *Cham* (1617), Cro. Jac. 425; *Leigh* v. *Gotyer* (1617), Cro. Ja 444; *Hamond* v. *Dod* (1625), Cro. Car. 5; *Wotton* v. *Hele* (167

Wms. Saund. 175 n. (ed. 1871, p. 524); *S. C. sub nom. Wootton . Heal*, 1 Mod. 66, 290; 1 Lev. 301; 1 Sidf. 466; 2 Keb. 684, 703, 09, 723; *Watkeys* v. *De Lancey* (1785), 4 Doug. 354; *Dudley* v. *olliott* (*supra*); *Seddon* v. *Senate* (1810), 13 East, 63, at p. 69; 2 R. R. 299; *Hall* v. *City of London Brewery Co., Ltd.* (1862), B. & S. 737; 31 L. J. Q. B. 257; 127 R. R. 541; *Jeffryes* v. *Evans* 1865), 19 C. B. (N.S.) 246; 34 L. J. C. P. 261; 147 R. R. 577; and e also *Dick* v. *Norton*, [1916] W. N. 73; 85 L. J. Ch. 623.

Exceptions: (1) Disturbance by covenantor.

Where the disturbances, etc., are those of covenantor himself, of his heirs or executors, the covenant extends to unlawful isturbances.

It was held in *Davie* v. *Sacheverell* (1635), 1 Roll. Abr. 429, pl. 7, at a lessor's covenant against *lawful* disturbance by the lessor is ot broken by his entry as a mere trespasser on the lessee; but ubsequently a distinction was taken between a tortious entry by a ranger and by the covenantor himself; and it is now admitted w that the covenantor cannot plead that his entry was unlawful order to avoid the consequences of his own wrongful act; for, as gainst the covenantor himself, the Court will not consider the word lawful": Platt, Cov. 319, citing *Andrew's Case of Gray's Inn* 1590), Cro. Eliz. 214; *Corus* v. —— (1596), Cro. Eliz. 544; *enning* v. *Plat* (1615), Cro. Jac. 383; *Tisdale* v. *Essex* (1616), [ob. 34; *Cave* v. *Brookesby* (1635), W. Jo. 360.

The following are examples:—*Ratcliff* v. —— (1617), 1 Brownl. G. 80 (where the entry was by the executors); *Hunt* v. *Allen* 1622), Winch. 25; *Crosse* v. *Young* (1685), 2 Show. 425; *Lloyd* v. *omkies* (1787), 1 T. R. 671 (in the two last-named cases the acts one by the covenantor amounted to a claim of title by him); *ndrews* v. *Paradise* (1724), 8 Mod. 319 (where the covenantor ected a gate across a way leading to the close which he had onveyed).

There is a dictum to the contrary, where the entry was for orting: *per* Lord Ellenborough C.J., *Seddon* v. *Senate* (1810), 3 East, 63, at p. 72, but this cannot be relied on.

(2) Disturbance by specified person.

Where the disturbances, etc., are those of a specified person they xtend to all his acts, both lawful and unlawful.

The following are examples:—*Foster* v. *Mapes* (1589), Cro. Eliz. 12; Ow. 100; 1 Leon. 324; *Lucy* v. *Leviston* (1673), Freem. K. B. 03; 3 Keb. 163; *Nash* v. *Palmer* (1816), 5 M. & S. 374; 17 R. R. 54; *Fowle* v. *Welsh* (1822), 1 B. & C. 29; 2 D. & Ry. 133; 1 L. J. .S.) K. B. 17; 25 R. R. 291.

Who are persons claiming under covenantor.

As the covenant for quiet enjoyment usually extends to the acts persons claiming under the covenantor, it is necessary to consider ho are persons "claiming under" the covenantor. See *Williams Gabriel*, *infra*, p. 621.

Appointee under power.

Covenant for quiet enjoyment, against the acts of "any pers or persons claiming or to claim by, from, or under" the lessor, in lease of land which was limited to him for life, remainder trustees to secure a jointure of £500 for his wife, with remainde over, and a joint power in the lessor and his wife to revoke a appoint new uses. The power of revocation was exercised, n uses appointed, and a person taking under the appointment evict the lessee. It was held that "as the husband was a necessa party to the second declaration of uses by which the estate w limited to the evictor, the evictor certainly claimed under h within the meaning of the covenant. Undoubtedly the husba had covenanted against his own acts, and the new limitations we created by one of his acts": *Hurd* v. *Fletcher* (1778), 1 Doug. 4

Prior appointee.

It has been held that a covenant for quiet enjoyment against persons "claiming by, from, or under" the covenantor is brok by the entry of a prior appointee under a joint exercise of a pow by A B and the covenantor: *Calvert* v. *Sebright* (1852), 15 Bea 156; or by the entry of the mortgagees of a term created before t lease with the concurrence of the covenantor, and assigned to t mortgagees with his concurrence, though the estate did not pa from him: *Carpenter* v. *Parker* (1857), 3 C. B. (N.S.) 206; L. J. C. P. 78; 111 R. R. 622.

Prior mortgagee.

Tenant in tail.

A tenant in tail is a person claiming under the covenantor, w settled the land on himself for life, remainder to the tenant in tai *Evans* v. *Vaughan* (1825), 4 B. & C. 261; 6 Dow. & Ry. 34 3 L. J. (O.S.) K. B. 213; 28 R. R. 250.

Resettlement.

A, being seised of an undivided moiety of a piece of land, settl it on himself for life, remainder to his eldest son in tail, and su sequently leased it, with a covenant for quiet enjoyment agai any acts of himself, his heirs or assigns, "or any other pers lawfully claiming by, from, or under him"; afterwards, on h eldest son's marriage, the land was settled on A for life, remaind on his son for life, remainder on such of his son's sons as his s should appoint. *Held*, that a grandson, to whom his son h appointed it, claimed under A: *Steele* v. *Mitchell* (1840), 2 Dr. Wal. 568; 3 Ir. Eq. R. 1; 56 R. R. 260.

Dower.

A man's widow claims under him in respect of her dower, b his mother does not: *Anon.* (1624), Godb. 333.

Superior landlord.

A superior landlord is not a person claiming through the less so the lessor is not liable for entry by the superior landlord ev on a breach by the lessor of his covenants: *Kelly* v. *Rodge* [1892] 1 Q. B. 910; 61 L. J. Q. B. 604; *Jones* v. *Lavingto* [1903] 1 K. B. 253; 72 L. J. K. B. 98; and see *Markham* v. *Pag* [1908] 1 Ch. 697, at p. 718; 77 L. J. Ch. 451; but where t lessor improperly consented to judgment in an action for recove

possession by the superior landlord, he was held liable on his ›venant as his act in consenting to judgment for possession was ıe cause of the tenant being turned out : *Cohen* v. *Tannar*, [1900] Q. B. 609; 69 L. J. Q. B. 904.

And it has been held that a distress for land tax due from the ›venantor prior to a demise is not a breach of a covenant for ıiet enjoyment, without any disturbance of or by the lessor " or ıy other person lawfully claiming or to claim from or under him "; ›r " the plaintiff's quiet enjoyment had not been disturbed by ıy one claiming by, from, or under the defendant, but by some ıe claiming against him " : *per* Lord Denman, C.J., *Stanley* v. *'ayes* (1842), 2 Gale & D. 411, at p. 413; 3 Q. B. 105; 11 L. J. . B. 176; 61 R. R. 144.

Distress for land tax, due prior to demise.

The assignee of the reversion who is not in a position rightfully › claim under his title from the lessor that he is authorised to do ıe acts alleged to constitute a breach of the covenant for quiet ıjoyment does not come within the expression " any person aiming under the lessor " as interpreted by Lord Esher in *'arrison, Ainslie & Co.* v. *Muncaster*, [1891] 2 Q. B. 680, at . 695; *Williams* v. *Gabriel*, [1906] 1 K. B. 155; 75 L. J. K. B. 49.

Assignee of reversion.

A covenant against incumbrances extends to those incumbrances of which the covenantee has notice.

Covenant against incumbrances extends to those of which covenantee has notice.

This is decided in *Levett* v. *Withrington* (1687), Lutw. 317 Nelson ed. 97); *Page* v. *Midland Ry. Co.*, [1894] 1 Ch. 11; 63 . J. Ch. 126, in which case a vendor whose title depended on the onstruction of a will, which was fully recited in the conveyance, ›as held liable on the usual covenants for title extending to the cts of the testator, the purchaser having been evicted by persons laiming under an alternative construction of the will; *G. W. Ry.* . *Fisher*, [1905] 1 Ch. 316; 74 L. J. Ch. 241. *Hunt* v. *White* 1868), 37 L. J. Ch. 326, which is *contra*, is overruled.

A mortgage by sub-demise is an incumbrance made by a person aiming under the lessor : *David* v. *Sabin*, *supra*, p. 610.

A covenant for further assurance only extends to the estate conveyed.

Covenant for further assurance.

Under a covenant for further assurance the covenantee is not ıtitled to an assurance of any further or other estate than that ›nveyed by the deed containing the covenant, or to payments of uties on reversionary interests : *Re Repington*, [1904] 1 Ch. 811; 3 L. J. Ch. 533.

"The covenant for further assurance in a deed is a covenar intended to give full effect and operation to the estate and intere conveyed by the deed. Where it is sought to extend the operatic of a general covenant of that kind to the execution of an instrumer which would bar a title in others which would continue but for th execution of the instrument sought to be executed, I have alwa understood that an express stipulation to that effect is necessar . . . For that reason it has, so far as I know, never been co sidered that a covenant for further assurance implied, withou regard to the other covenants in the deed, a covenant to levy fine, or to suffer a recovery, or to surrender a copyhold. Th utmost extent to which the Court has gone with reference to cov nants for further assurance has been to extend their operation t that very estate and interest which are conveyed by the deed. a tenant in tail conveys in fee simple upon a recital that he entitled to the fee, and the instrument contains no covenant t suffer a recovery, or to levy a fine, the Court, finding an expre contract which relates to an estate in fee, which is purported to b conveyed by the instruments, extends the operation of the cov nant for further assurance so as to apply to the subject-matt of the grant, which it is in the power of the grantor to complet by an instrument, although that instrument may bar and conclu the title of other persons. . . . I can find no contract in this dee for enlarging the estate of the grantor to any extent; and I conceiv that, unless there be words in the instrument which can show was intended that the covenant for further assurance should exten to enlarging the estate conveyed, and to barring an interest i other persons than the grantor, the Court is not justified i resorting to its extraordinary jurisdiction for specific performan to compel the grantor to execute an assurance of a kind that wa not, and could not, from the form of the instrument, be though to be in his contemplation at the time when the grant by him wa made": *per* Stuart, V.-C., *Davis* v. *Tollemache* (1856), 2 Ju (N.S.) 1181, at p. 1185; 28 L. T. (O.S.) 188; 106 R. R. 1006.

Tenant in tail.

Dicta *contra*.

Dicta can be found extending this doctrine, but they must b carefully confined to the cases before the Judges. Thus in the ca of *King* v. *Jones* (1814), 5 Taunt. 418; (15 R. R. 533, affirme *sub nom. Jones* v. *King* (1815), 4 M. & S. 188; 15 R. R. 539 which was an action by the heir of a purchaser for damages f breach of a covenant for further assurance contained in the co veyance of the land by a husband and wife, *who purported t convey the fee simple* to the purchaser, whose heir was evicted b reason of the husband and wife not having levied a fine, thoug requested to do so by the purchaser, Heath, J., says, at p. 427 "Under this covenant the heir might call for further assurance

ven to levy a fine; he certainly might have called for the removal f a judgment or other incumbrances."

This passage has been approved in *Stock* v. *Aylward* (1858), Ir. Ch. Rep. 429; and see *Re Jones*, [1893] 2 Ch. 461, at p. 471, nd cases cited; 62 L. J. Ch. 996.

Mr. Rawle's criticism.

But on this Mr. Rawle (Cov., p. 198 (4th ed.)) observes: "It is onceived that this proposition must be taken with some qualifica- on, depending either, first, on the scope of the other covenants in he deed, or secondly, on the nature of the estate conveyed. For . . . ll the other covenants for title are either general, *i.e.*, extending *all* paramount titles and incumbrances, or limited, extending nly to defects of title or incumbrances created by the vendor. But he covenant for further assurance has in general the same form of xpression, whether the other covenants which accompany it are eneral or limited; it is an undertaking that the vendor will execute uch further assurance as may be deemed necessary by the pur- haser. If the other covenants in the deed are general, if their reach will be caused by reason of an incumbrance not created by he vendor, then it is conceived that the proposition is correct, and hat the purchaser may, instead of suing at law upon his other ovenants, invoke the aid of equity to remove the incumbrance. ut if the other covenants are limited and the purchaser would herefore be without remedy at law upon them by reason of the ncumbrance not having been created by the vendor, it is obvious hat the vendor cannot be compelled to remove an incumbrance hich he had not covenanted against.

Nature of estate conveyed.

"So, too, the purchaser's right may depend on the nature of he estate conveyed. There is a class of cases (see *Clanrickard* v. *idney* (1616), Hob. 273; *Delmer* v. *M'Cabe* (1863), 14 Ir. C. L. R. 77) which decide that although the covenants for title may be eneral, yet, when the conveyance is but of a limited estate or nterest, the covenants will themselves be restrained and limited o the estate conveyed. Under such circumstances it would be nequitable that the purchaser should, by virtue of a covenant for urther assurance, require the conveyance to himself of any greater state.

"It is obvious, therefore, that no more is meant than that here the covenants for title are not limited or restrained by [*sic*, *uaere* restricted to] either the acts of the vendor or the particular state conveyed, the purchaser has a right, under the covenant for urther assurance, to require the conveyance of a paramount title r the removal of an incumbrance; but where the other covenants re limited to the acts of the vendor, or restrained by any particular state, the purchaser will have no right under this covenant to

require the conveyance of any other estate, or the removal of a incumbrance not created by the vendor."

Lord St. Leonards' remarks.

So Lord St. Leonards says: "If the title prove bad, and *th defect can be supplied by the vendor*, the purchaser may file a bil in equity for a specific performance of the covenant for furthe assurance. And a vendor who has sold a bad title will, under covenant for further assurance, be compellable to convey any titl which he may have acquired since the conveyance, although h actually purchased such title for valuable consideration": Sugd V. & P. (14th ed.), p. 612, citing *Taylor* v. *Debar* (1675) 1 Ch. Ca. 274; 2 Ch. Ca. 212; and *Seabourne* v. *Powell* (1686) 2 Vern. 11.

Mr. Rawle's criticism.

But on this passage Mr. Rawle remarks that "the language unless carefully considered, might mislead"; that "it i undoubtedly correct if the covenant for further assurance is th only one in the deed, or if the other covenants are unlimited o general. But if the covenant for further assurance is, eithe expressly or by implication, limited or restrained by other cove nants, or by the grant itself (*Davis* v. *Tollemache* (1856), 2 Jur (N.S.) 1181; 28 L. T. (O.S.) 188), then the remark would seem t have rather too broad an application": Rawle, Cov. 199, note (2) where it is also observed that *Taylor* v. *Debar* was clearly a case i which the conveyance of the after-acquired title was properly com pellable, and that in *Seabourne* v. *Powell* there was not any cove nant for further assurance.

What acts within the covenant.

Whether disentailing deed must be executed.

As a general rule it seems that a purchaser cannot require hi vendor who was only tenant in tail to execute a disentailing deed *Davis* v. *Tollemache*, *supra*; but in *Edwards* v. *Applebee* (1765) 2 Bro. C. C. 652, n.; and in *Pye* v. *Daubuz* (1796), 3 Bro. C. C 595 (neither of which cases was referred to in *Davis* v. *Tollemache*) the assignees in bankruptcy of the vendor, tenant in tail, wer directed to convey the fee simple, though there seem to have bee no special words in the covenant; in the latter case, however, is stated that the vendor represented himself to be seised in fe But in a case where a tenant in tail in remainder, who had enlarge such estate into a base fee, by a conveyance, which recited a agreement for the sale of all his estate and interest, right and tit under the will, which created the entail, in the farm, granted, a to all his estate and interest, right and title under the said wi in the said farm, the said farm to the purchaser in fee, and cove nanted that he would execute every such disentailing and oth assurance and do every such other thing for further or more pe fectly assuring all or any of the said premises to the purchas as by the purchaser should be reasonably required: it was hel that the vendor, after the death of the tenant for life, was bound t

arge the base fee into a fee simple by executing a new disentailing d : *Bankes* v. *Small* (1887), 36 Ch. D. 716; 56 L. J. Ch. 832.

As to the extent to which a Court of equity will actively erfere to enforce the making good of representations that a rson is entitled as tenant in tail to certain properties, when such not the case, see *Mills* v. *Fox* (1887), 37 Ch. D. 153, at p. 166; L. J. Ch. 56; and on the point of estoppel by representation, see *den* v. *Money* (1854), 5 H. L. C. 185; 23 L. J. Ch. 865, cited the last preceding case.

In commenting on the judgment of Fry, J., in *Bankes* v. *Small*, *ra*, Astbury, J., says : " I think what the learned Judge meant re was that you cannot relieve against the defective execution the non-execution of a power to disentail which you have not rcised, nor on any other ground can the Court of Equity treat effectual under the Act " (*sc.* the Fines and Recoveries Act) n assurance which as such is not so, referring, that is, to deeds ich are imperfect as such and which as such are the deeds of parties and not to deeds which having regard to accidental erfection are not, unless and until rectified, the deeds of the ties at all " : *Meeking* v. *Meeking*, [1917] 1 Ch. 77, at p. 89; L. J. Ch. 97.

A, who had mortgaged the fee, leased the equity of redemption assigned the rent reserved on the lease to B by way of security, did not convey to him any estate in the land. The assignment tained a covenant for further assurance. Lord Hardwicke, C., : " I think this covenant is, in equity, a covenant to make a tgage " : *Ex p. Wills* (1790), 2 Cox, 233.

Duplicate conveyance.

It has been held that under a covenant for further assurance the enantee can require the execution of a duplicate conveyance re he has handed over the original to a purchaser from him of of the estate; Sugd. V. & P. (14th ed.), p. 613; *Napper* v. *d Allington* (1700), 1 Eq. Ca. Ab. 166, pl. 4, but this decision reversed on rehearing on another point; Platt, Cov. 344, a.

Covenant to produce deeds.

t seems doubtful whether the covenantor can be required to ute a covenant to produce title-deeds to the purchaser : *Fain yers* (1826), 2 Sim. & St. 533; 4 L. J. (o.s.) Ch. 166; 25 R. R. ; reported differently 1 Russ. 259, n.; *Hallett* v. *Middleton* 6), 1 Russ. 243, at pp. 256, 257; or to give fresh covenants title : *Thornborough* v. *Monpenson* (1594), Cro. Eliz. 370; *sey* v. *Newsam* (1603), Yelv. 44; *Coles* v. *Kinder* (1620), Jac. 571; *Lassels* v. *Catterton* (1670), 1 Mod. 67. There distinction " between mere agreements to convey by reasonable rance, which are held to carry with them a right to covenants itle in the deed of conveyance, and a right to the insertion of

Covenants for title.

those covenants in the deed of further assurance itself": Ra 202; Sugd. V. & P. (14th ed.), p. 615.

Act must be necessary;

In a covenant to do all "reasonable acts" for further as ance, "a reasonable act means such an act as the law requi and if it be an unnecessary act, it is not a reasonable act, or which would be required by law": *per* Wood, B., *Warn Bickford* (1821), 9 Pri. 43, at p. 51.

and practicable.

The act required must be practicable. As to illness, lunacy death of the covenantor, whereby the act required ceases to reasonable or practicable, see *Anon.* (1582), Moore, 124, pl. 2 *Pet and Cally's Case* (1589), 1 Leon. 304; *Nash* v. *Aston* (16 T. Jo. 195; Skin. 42; Rawle, Cov. 197.

"As counsel shall advise."

If the covenant is to make "such further assurance as cou shall advise," the purchaser must tender the intended assura to the covenantor: *Bennet's Case* (1582), Cro. Eliz. 9; *Hig bottom's Case* (1592), 5 Rep. 19 b; and the purchaser hims though learned in the law, cannot advise: *Rosewel's Case* (15 5 Rep. 19 b; and the counsel is the purchaser's counsel: *Hig bottom's Case, supra.*

Where time for performance is limited.

If there be by the covenant a time limited within which act further assurance are to be done, the purchaser must make req within the time named: *Nash* v. *Aston* (1682), T. Jo. 1 Skin. 42; it is sufficient if he makes a general request: *Pudse Newsam* (1603), Yelv. 44; 1 Brownl. & G. 84; Moore, 682; eve the assurance is to be such as shall satisfy the purchaser's coun *Baker* v. *Bulstrode* (1674), 2 Lev. 95; T. Raym. 232; differe reported, 1 Mod. 104.

Original conveyance void.

Specific performance will be refused where the original veyance itself is void: as if a man covenants to stand seised to use of a mere stranger and to make further assurance: *Fursake Tursaker* v. *Robinson* (1717), Prec. Ch. 475; Gilb. Eq. R. 1 Abr. Eq. 123; Platt, Cov. 353.

Distinguished from estoppel.

The cases arising upon the covenant for further assurance n be distinguished from those which depend upon the rule, that man, having a defective title, purports to convey property value, and afterwards acquires a good title, equity renders good title available for supporting the conveyance.

A and his wife mortgaged a lease, which was not veste them, but in C, who afterwards made a lease to trustees for wife. Such trustees were directed to make a new mortgage to mortgagee: *Seabourne* v. *Powell* (1686), 2 Vern. 11.

Where copyholds were mortgaged to the plaintiff's testato freeholds, the customary heir of the mortgagor was directe surrender to the use of the plaintiff: *Spencer* v. *Boyes* (17 4 Ves. 370; 4 R. R. 215.

And where a person entitled to a contingent remainder con-
yed that interest to secure a debt, and the remainder was after-
ırds destroyed, the grantor was made to convey a new interest,
nich he acquired under the will of another person : *Noel* v. *Bewley*
829), 3 Sim. 103; 149 R. R. 684; but this decision was doubted
Smith v. *Osborne* (1857), 6 H. L. C. 375, at p. 392; 108 R. R.
1, but followed in *Re Bridgwater's Settlement*, [1910] 2 Ch. 342;
L. J. Ch. 746.

" Having carefully examined the cases, I feel convinced that
e decision in *Re Hoffe's Estate Act, 1855* (*sic*), in which the
inciple stated in *Noel* v. *Bewley* was followed, was right; that
e principle so stated was the right principle; and that the decision
Noel v. *Bewley* was wrong only because the principle was mis-
plied by Shadwell, V.-C., to the particular facts then before
n " : *per* Sargant, J., in *Re Harper's Settlement*, [1919] 1 Ch.
0, at p. 275; 88 L. J. Ch. 245.

" These cases " (*viz.* : *Seabourne* v. *Powell* (1686), 2 Vern. 11;
el v. *Bewley*, *supra*; and *Morse* v. *Faulkner* (1792), 1 Anst. 11;
Swanst. 429, n., in which case no relief was given) " seem to
to establish this, that if a man sells an estate (and the principle
just the same if he grants his lands in mortgage, or creates an
nuity issuing out of them) and the title is afterwards defeated,
t subsequently he acquires the same lands under another title,
ere is an equity arising out of the contract to fasten it upon
new title " : *per* Sugden, C., *Jones* v. *Kearney* (1841), 1 Dru. &
ar. 134, at p. 159; 58 R. R. 249.

In *Smith* v. *Baker* (1842), 1 Y. & Coll. C. C. 223, A, supposing
nself to be entitled to the fee simple of land, subject to his
other's life estate, conveyed it to trustees for the benefit of his
editors, with covenants for title and further assurance. In fact
mother was the owner in fee simple; but on her death the land
scended to A, and it was held that he must assure the estate so
quired by him.

A being entitled to one-ninth of a fund purported to assign one-
th of the fund to B. Subsequently another one-eighteenth was
quired by A. *Held*, that B was entitled to the whole of A's one-
th : *Re Hoffe's Estate Act, 1885* (1900), 82 L. T. 556.

CHAPTER XXXII.

COVENANTS IN RESTRAINT OF TRADE.

Restraints of Trade originally Void : Now Valid if Reasonab Reasonable if Limited to Particular Business in Partic Area : And even if Area Unrestricted : Not to Trade v Covenantee's Customers : Unreasonable Covenant Valid so as Reasonable, if Severable : Restraints Severed qua A qua Business, qua Customers : Severance as regards Tin Benefit of Covenant is Assignable : How Distance Measur Unreasonable Covenants : What amounts to a Breach.

All restraints of trade formerly void.

ALL covenants in restraint of trade, general or partial, w originally void. Thus in a case where the plaintiff sued on a b with a condition not to practise the craft of a dyer in the to of B for six months, Hull, J., said : " The bond is void, for t the condition is contrary to the common law, and by God, if plaintiff were here, he should go to prison until he paid a fine to King " : Y. B. 2 Hen. 5 (1414), 5 [B], pl. 26; and *Colgate Bacheler* (1601), Cro. Eliz. 872, is another early authority to same effect; but the rule was relaxed in the eighteenth century, partial restraints were held valid, at any rate as soon as *Mitche Reynolds* (1711), 1 P. Wms. 181, whether because they were o partial, or because, being only partial, they were reasonable, i question decided differently by Bowen, L.J., and Lord M naghten : and the law has now been definitely laid down in House of Lords as follows :—

Reasonable restraints are now valid.

> " All restraints of trade of themselves, if th is nothing more, are contrary to public policy, a therefore void. That is the general rule. But th are exceptions. Restraints of trade may be justif by the special circumstances of a particular case. is a sufficient justification, and indeed it is the o justification, if the restriction is reasonable—reas able that is in reference to the interests of parties concerned, and reasonable in reference

the interests of the public": *per* Lord Macnaghten, *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, at p. 565; 63 L. J. Ch. 908. See also *Att.-Gen. of the Commonwealth of Australia* v. *Adelaide S.S. Co., Ltd.*, [1913] A. C., at p. 795; 83 L. J. P. C. 84; *Horwood* v. *Millar's Timber, etc. Co.*, [1917] 1 K. B., at pp. 317-8; 86 L. J. K. B. 190. The more recent cases show that Lord Macnaghten's rule has been enlarged and in some respects altered.

"It was suggested in argument that the interests of the public ght to be considered and weighed in determining whether a straint is reasonable in the interest of the parties. I dissent from s view. It would, indeed, entirely destroy the value of Lord acnaghten's tests of reasonableness. The first question in every se is whether the restraint is reasonable in the interests of the rties. If it is not, the restraint is bad. If it is, it may still be own that it is injurious to the public, though, as I pointed out the case referred to, the onus of so showing would lie on the rty alleging it": *per* Lord Parker of Waddington, *Morris, Ltd.* *Saxelby*, [1916] 1 A. C. 688, at p. 708; 85 L. J. Ch. 210.

Reasonableness of restraint for judge.

The question whether a covenant in restraint of trade is wider an is reasonably necessary to protect the covenantee is one for Judge, not for the jury: *Dowden and Pook, Ltd.* v. *Pook*, 904] 1 K. B. 45; 73 L. J. K. B. 38.

"This" (*sc.* the decision whether or no a clause of a contract against public policy) "is a matter of law which the Court has decide, and not a matter of fact which at a trial with a jury uld be left to the jury": *per* Fletcher Moulton, L.J., in *Leng &*, *Ltd.* v. *Andrews*, [1909] 1 Ch. 763, at p. 770; 78 L. J. Ch. *Mason* v. *Provident, etc., Co., Ltd.*, [1913] A. C. 724, at 732; 82 L. J. K. B. 1153. See also *Whitmore* v. *King* (1918), L. J. Ch. 647; 119 L. T. 533.

Evidence of experts inadmissible.

The evidence of persons engaged in the particular trade tating their views of the reasonableness of the restrictive use" is inadmissible: *per* Lindley, M.R., *Haynes* v. *Doman*, 99] 2 Ch. 13, at p. 24; 68 L. J. Ch. 419.

No restrictive covenant in gross.

There cannot be a restrictive covenant in gross: *Horner* v. *ves* (1831), 7 Bing. 735; 33 R. R. 635; 5 Mand. P. 768. erred to in *Leetham & Sons, Ltd.* v. *Johnstone-White*, [1907] h. 322, at p. 326; 76 L. J. Ch. 304. See also *Townsend* v. *man*, [1900] 2 Ch. 698, at p. 701; 69 L. J. Ch. 823.

Restraint is reasonable if limited to particular trade in particular area.

If the restraint applies only to a particular trade in a limi area, it is *prima facie* reasonable. The following covenants ha been held to be reasonable :—

Trade.	Duration.	Area.	Authority.
Baker	5 years	In the parish	*Mitchel* v. *Reynolds* (17 1 P. Wms. 181.
Linen-draper ...	No limit	½ mile from shop	*Chesman* v. *Nainby* (1726 Stra. 739; 2 Ld. Raym. 14 affirmed 1 Bro. P. C. 234
Tallyman ...	7 years	City of Westminster	*Colmer* v. *Clark* (1734) Mod. 230; *S. C. sub. n Clerke* v. *Comer*, Cas. te Hardw. 53.
Surgeon	14 years	10 miles from Thetford	*Davis* v. *Mason* (1793) T. R. 118; 2 R. R. 562.
Attorney ...	No limit	London and 150 miles thence	*Bunn* v. *Guy* (1803), 4 E 190; 7 R. R. 560.
Rope-maker ...	Vendor's life	To employ only purchasers to make rope	*Gale* v. *Reed* (1806), 8 E 80; 9 R. R. 376.
Apothecary ...	No limit	20 miles of Ailesbury	*Hayward* v. *Young* (1818 Chitty, 407.
Coaching business	No limit	Between Reading and London	*Williams* v. *Williams* (18 2 Swanst. 253.
Saddlers' Ironmonger	14 years	Certain towns	*Homer* v. *Ashford* (1825) Bing. 322; 4 L. J. (o C. P. 62; 28 R. R. 634.
Travelling-trunk makers	Covenantors' lives	Certain districts of England	*Wickens* v. *Evans* (1829 Y. & J. 318; 32 R. R. 80
Druggist... ...	No limit	Taunton and 3 miles thereof	*Hitchcock* v. *Coker* (1837 Ad. & E. 438; 6 L. J. 266; 45 R. R. 522.
Carriers	No limit	Between London and divers other towns	*Archer* v. *Marsh* (1837), 6 & E. 959; 6 L. J. K. 244; 45 R. R. 655.
Stage coach proprietors	While covenantee carried on business	Between Croydon and Charing Cross	*Leighton* v. *Wales* (1838 M. & W. 545.
Cowkeeper or milkman	While in service and 2 years after	5 miles from Northampton Square	*Proctor* v. *Sargent* (1840 M. & Gr. 20; 2 Sco. N. 289; 10 L. J. C. P. 58 R. R. 342.
Attorney ...	20 years	Great Britain	*Whittaker* v. *Howe* (1841 Beav. 383; 52 R. R. 162
Dentist	No limit	London	*Mallan* v. *May* (1843), 11 & W. 653; 12 L. J. 376; 63 R. R. 708.

Trade.	Duration.	Area.	Authority.
ker	14 years	Within one mile of shop	*Rannie* v. *Irvine* (1844), 7 M. & Gr. 969; 14 L. J. C. P. 10; 66 R. R. 818.
ilor	No limit	20 miles from Standard on Cornhill	*Rolfe* v. *Rolfe* (1846), 15 Sim. 88; 74 R. R. 25.
own-glass naker	7 years	Not to serve any other person than covenantees	*Pilkington* v. *Scott* (1846), 15 M. & W. 657; 15 L. J. Ex. 329; 71 R. R. 781.
fumer, toy-nan and hair nerchant	No limit	London and Westminster	*Price* v. *Green* (1847), 16 M. & W. 346; 16 L. J. Ex. 108; 73 R. R. 522.
ker and seller of ginger beer	No limit	1 mile of former place of business	*Pemberton* v. *Vaughan* (1847), 10 Q. B. 87; 16 L. J. Q. B. 161; 74 R. R. 211.
rgeon... ...	No limit	Macclesfield and 7 miles thereof	*Sainter* v. *Ferguson* (1849), 7 C. B. 716; 18 L. J. C. P. 217; 78 R. R. 804.
rgeon... ...	No limit	28 Dorset Crescent and 2½ miles thereof	*Atkyns* v. *Kinnier* (1850), 4 Exch. 776; 19 L. J. Ex. 132; 80 R. R. 767.
tcher... ...	No limit	5 miles	*Elves* v. *Crofts* (1850), 10 C. B. 241; 19 L. J. C. P. 385; 84 R. R. 553.
ne and spirit merchant	No limit	Counties of Carnarvon Anglesey and Merioneth	*Turner* v. *Evans* (1852), 2 D. M. & G. 740; 22 L. J. Q. B. 412; 95 R. R. 312; (1853), 2 E. & B. 512 (*a*).
blishers' can-vassing trade	No limit	London, Middlesex, Surrey, 150 miles from G.P.O., nor in Dublin or Edinburgh, or within 50 miles of either	*Tallis* v. *Tallis* (1853), 1 El. & B. 391; 22 L. J. Q. B. 185; 93 R. R. 197.
neral Merchant	No limit	District between Morwenstow, Newquay, Launceston and Bodmin	*Avery* v. *Langford* (1854), Kay, 663; 23 L. J. Ch. 837; 101 R. R. 800.
licitor and General Mana-ger of Estates	21 years	Parish of T. and 21 miles thereof	*Dendy* v. *Henderson* (1855), 11 Exch. 194; 24 L. J. Ex. 324; 105 R. R. 488.
lkman ...	While in service and 2 years after	3 miles from Charles Street	*Benwell* v. *Inns* (1857), 24 Beav. 307; 116 R. R. 131.
aveller in lace rade	No limit	Districts travelled by covenantor	*Mumford* v. *Gething* (1859), 7 C. B. (N.S.) 305; 29 L. J. C. P. 105; 121 R. R. 501.

(*a*) Followed in *Hadsley* v. *Dayer-Smith*, [1914] A. C. 979; 83 L. J. Ch. 770.

Trade.	Duration.	Area.	Authority.
Horsehair manufacturer	No limit	Within 200 miles of Birmingham	*Harms* v. *Parsons* (1862), Beav. 328; 32 L. J. 247; 138 R. R. 756.
Drapery and hosiery	No limit	Within 2 miles of a shop in Pimlico	*Brampton* v. *Beddowes* (186 13 C. B. (N.S.) 538; R. R. 639 (*b*).
Manufacture or sale of productions now manufactured in covenantee's business	No limit	Europe	*Leather Cloth Co.* v. *Lors* (1869), L. R. 9 Eq. 345; L. J. Ch. 86.
Surgeon	While covenantee or his assigns carried on business	N. and 10 miles	*Graveley* v. *Barnard* (187 L. R. 18 Eq. 518; 43 L. Ch. 659.
Surgeon	No limit	N. and within 10 miles thereof	*Palmer v. Mallet* (1887), Ch. D. 411; 57 L. J. Ch. 2
Sale of beer and malt liquors	2 years	100 miles of G.P.O. at Cardiff	*Rogers* v. *Maddocks*, [1892 Ch. 346.
Commercial traveller	12 years	Certain counties in Ireland	*Cussen* v. *O'Connor* (189 32 L. R. Ir. 330.
Patentee and manufacturer of guns and ammunition	25 years	—	*Nordenfelt* v. *Maxim-N denfelt Guns and Ammu tion Co.*, [1894] A. C. 5 63 L. J. Ch. 908.
Hay and straw merchant	12 months	United Kingdom	*Underwood & Son, Ltd. Barker*, [1899] 1 Ch. 3 68 L. J. Ch. 201.
Hardware manufacturer	No limit	25 miles of covenantee's works	*Haynes* v. *Doman*, [1899 Ch. 13; 68 L. J. Ch. 419
Pneumatic tubes for transmission of parcels	5 years	Eastern Hemisphere	*Lamson Pneumatic Tube* v. *Phillips* (1904), 91 L. 363.
Salt manufacturers	4 years	—	*North-Western Salt Co. Electrolytic Alkali Co.*, L [1914] A. C. 461; 83 L. K. B. 530.
Agent	5 years	50-mile radius of a trading station in West Africa	*Millers* v. *Steedman* (191 84 L. J. K. B. 2057; L. T. 538.
Solicitor... ...	No limit	Within a radius of 7 miles of the Town Hall of Tamworth	*Fitch* v. *Dewes*, [1921] A. C. 158; 90 L. J. Ch. (*c*).

(*b*) In this case the covenant was broken by the covenantor supplying custom within the prohibited area, though his shop was outside such area.

(*c*) Distinguished on the facts in *Bowler* v. *Lovegrove* (1914), 123 L. T. 6

Trade.	Duration.	Area.	Authority.
ıventor ...	5 years	—	*Rely-a-Bell Burglar and Fire Alarm Co.* v. *Eisler* [1926] 1 Ch. 609; 95 L. J. Ch. 345.
ailor	5 years	(*inter alia*) Snow Hill, Birmingham or within a ½-mile radius of Aston Cross or Bristol Road, Birmingham	(*d*) *Putsman* v. *Taylor* [1927], 1 K. B. 741; 96 L. J. K. B. 315.
Dealer in toilet soaps, etc.	No limit	—	*Palmolive Co.* v. *Freedman*, [1927] 2 Ch. 333; 96 L. J. Ch. 402.

Note, if the restriction applies only to a particular trade, it ıay be reasonable, even if the area is unrestricted.

General restriction of particular trade held reasonable.

Thus the following covenants, though unrestricted as regards rea, have been held reasonable :—

Not to carry on the business of a carrier, except as assistant to ɔvenantee : *Wallis* v. *Day* (1837), 2 M. & W. 273; 6 L. J. Ex. 2; 46 R. R. 602. Cf. *Milsted & Sons, Ltd.* v. *Hamp*, [1927] V. N. 233.

" Not to represent any other champagne house for two years, nd not to establish myself nor to associate myself with other ersons or houses in the champagne trade for ten years " : *'ousillon* v. *Rousillon* (1880), 14 Ch. D. 351; 49 L. J. Ch. 339.

" Not for three years to enter any like or similar business, and ot to start a business of that kind themselves " : *Badische Anilin nd Soda Fabrik* v. *Schott, Segner & Co.*, [1892] 3 Ch. 447; 61 . J. Ch. 698.

Not for twenty-five years to engage in the business of a manu-ɔcturer of guns or ammunition : *Maxim-Nordenfelt Guns and mmunition Co.* v. *Nordenfelt*, [1893] 1 Ch. 630; *S. C. sub nom. ordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.*, 1894] A. C. 535; 63 L. J. Ch. 908.

" Not during this engagement . . . to carry on or be engaged ther directly or indirectly as principal, agent, servant, or other-ise in any trade, business, or calling . . . relating to goods of any ɜscription sold or manufactured by " the covenantees, " their ccessors and assigns " : *William Robinson & Co.* v. *Heuer*, 898] 2 Ch. 451; 67 L. J. Ch. 644.

(*d*) The question of severability, raised before the Divisional Court, was not ɜen by the Court of Appeal.

A covenant, restricted in area, though unlimited in point c time, held reasonable : *Fitch* v. *Dewes*, [1921] 2 A. C. 158; 90 L. J Ch. 436.

"London" is not too vague an area : *Mason* v. *Providen etc., Co., Ltd.*, [1913] A. C. 724; 82 L. J. K. B. 1153, but ma be too wide.

Not to trade with covenantee's customers is reasonable.

Similarly covenants not to trade with customers of the cov nantee have been held reasonable.

Thus the following covenants have been upheld :—

Not during the term of a lease assigned to solicit the custom o or knowingly supply bread or flour to, any of the customers the dealing at the shop : *Rannie* v. *Irvine* (1844), 7 Man. & G. 969.

Not after the expiration of articles directly or indirectly t interfere or intermeddle with or be concerned as attorney, agent c otherwise for any person who had already been the client c correspondent in business of the plaintiff, and not to act as partne clerk or assistant to any such person : *Nicholls* v. *Stretton* (1847 7 Beav. 42; 10 Q. B. 346; 64 R. R. 10.

Not to serve or interfere with any customer served by or belon ing at any time to the master : *Baines* v. *Geary* (1887), 35 Ch. I 154; 56 L. J. Ch. 935.

But applies only to particular business.

"Not to call upon, or, directly or indirectly, solicit orders fron or in any way deal or transact business with," anyone who ha during the covenantor's employment been a customer of the cov nantee. *Held*, to apply only to a business of a kind similar t that of covenantee and to be valid : *Mills* v. *Dunham*, [1891] 1 C 576; 60 L. J. Ch. 362.

"Not to serve, or solicit, or in any way interfere with any the customers who should at any time be served by, or the belonging to," the covenantee : *Dubowski & Sons* v. *Goldstei* [1896] 1 Q. B. 478; 65 L. J. Q. B. 397.

Whether such a covenant can apply to future customers.

Whether a covenant not to solicit customers of a business, wh were not customers thereof, at the time of the covenantor's emplo ment, is good or not is doubtful : *Dubowski & Sons* v. *Goldstei supra*; and see *East Essex Farmers, Ltd.* v. *Holder*, [1926] W. N 230, where the dicta of Lord Esher, M.R., and Rigby, J., on th point in the last-mentioned case were not followed.

A covenant not to solicit customers of the business of the cov nantee applies to his then existing business, and not to a busine started by him elsewhere : *Dubowski & Sons* v. *Goldstein*, *supr* Cf. *Konski* v. *Peet*, [1915] 1 Ch. 530; 84 L. J. Ch. 513.

Unreasonable covenant may be good so far as reasonable, if severable.

If the restraint imposed be, as a whole, unreasonable, extending too far, as regards either (i) the area over which extends, or (ii) the business to which it applies, it can, notwit standing, be enforced, so far as it is reasonable, but the unreaso

ble provisions must be severable from those which are reasonable n the face of the instrument itself.

Severance must appear on face of instrument.

The Court will not enforce a single stipulation, so far as it is asonable. Thus in *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520; 7 L. J. Ch. 889, an agreement " not to enter the service or employ f any other person . . . or carry on any business whatsoever ithin one mile of X for two years " was held unreasonable, and e Court refused to sever the stipulation into a restraint as to e business carried on by the covenantee and a restraint as to ther businesses, and to enforce it so far as related to the business arried on by the covenantee.

" I think, therefore, that it is still the law that a contract can e severed if the severed parts are independent of one another nd can be severed without the severance affecting the meaning f the part remaining. . . . I think it clear that if the severance f a part of the agreement gives it a meaning and object different n kind and not only in extent, the different parts of it cannot be aid to be independent " : *per* Lord Sterndale, M.R., in *Attwood . Lamont*, [1920] 3 K. B. 571, at p. 577—8. See also *British oncrete Co.* v. *Schelff*, [1921] 2 Ch. 563, and *Nevanas & Co.* v. *Valker*, [1914] 1 Ch. 413, at pp. 422—3; 83 L. J. Ch. 380.

Severance not implied from proviso.

And such severance cannot be implied from a proviso : *Perls* v. *aalfeld*, [1892] 2 Ch. 149; 61 L. J. Ch. 409, where a covenant by servant not to accept another situation or establish himself in ny business within fifteen miles of London without the coveantee's written consent for a period of three years was held nreasonable and void, notwithstanding a provision that such perission was not to be withheld if the situation sought or business stablished was not for the sale of the same class of goods as those old by the covenantee.

Restraints held severable *qua* area.

Restraints have been held severable, as regards area, in *hesman* v. *Nainby* (1726), 2 Stra. 739; 2 Ld. Raym. 1456; Bro. P. C. 234, where " the house then occupied " was severed om " any house to which he might remove " : in *Mallan* v. *May*, *upra*, p. 630, where " London " was severed from " any town here the covenantee might have been practising " : in *Price* v. *reen*, *supra*, p. 631, where " London and Westminster " were evered from " 600 miles from the same respectively " : and in . *Underwood & Son, Ltd.* v. *Barker*, [1899] 1 Ch. 300; 68 L. J. h. 201, where " the United Kingdom " was severed from France, Belgium, Holland, and Canada "; and in *Goldsoll* v. *oldman*, [1915] 1 Ch. 293; 84 L. J. Ch. 228, where " the county London . . . or any part of the United Kingdom of Great ritain and Ireland and the Isle of Man " was severed from France, e United States, Russia, Spain, etc.

Qua business.

Restraints have been held severable, as regards businesses, i *Rogers* v. *Maddocks*, [1892] 3 Ch. 346; 62 L. J. Ch. 219, whe "aerated waters" were severed from "malt liquors": and i *William Robinson & Co., Ltd.* v. *Heuer*, [1898] 2 Ch. 451; 6 L. J. Ch. 644, where "any business relating to goods of an description made or sold by the company" was severed from "an other business whatever"; and in *Goldsoll* v. *Goldman*, *supr* "imitation jewellery" was severed from "real jewellery."

Qua customers.

And restraints have been held severable as regards custome of the covenantee, in *Nicholls* v. *Stretton* (1847), 7 Beav. 42; 1 Q. B. 346, where clients of the covenantee during the covenantor employment were severed from clients of the covenantee after th ceasing thereof and from clients of his successors: and in *Baines* v *Geary* (1887), 35 Ch. D. 154; and *Dubowski* v. *Goldstein*, [1896 1 Q. B. 478; 65 L. J. Q. B. 426, where customers served durin the covenantor's employment were severed from those served by c belonging at any time to the covenantee, his successors or assign

Severance as regards duration.

There does not appear to be any case where there has been an severance as regards duration; but as regards duration "no cas can be found in which an agreement in restraint of trade, fre from objection in other respects, has been held void simply becaus its duration was not restricted": *per* Lindley, M.R., *Haynes* v *Doman*, [1899] 2 Ch. 13, at p. 23; 68 L. J. Ch. 419; and see *pe* Rigby, L.J., *ibid.*, at p. 22.

It will be seen from the table, *ante*, p. 630, that there was n limit of duration in many of the cases there stated, and there wa no limit of duration in *Mills* v. *Dunham*, [1891] 1 Ch. 576.

How long unlimited covenant lasts.

It is said in *Davey* v. *Shannon* (1879), 4 Ex. D. 81; 48 L. J Ex. 459, that an agreement unlimited in point of duration last during the joint lives of covenantor and covenantee; but it ma be doubted whether this is correct; there seems to be no reaso why it should not last for the life of the covenantor.

Onus.

The onus of showing that the restraint sought to be impose by the covenant is no more than is reasonable for the protectio of his business lies upon the covenantee: *Attwood* v. *Lamon* [1920] 3 K. B. 571, at pp. 587—8.

Restraint limited as to duration.

A restraint if limited as to duration is *prima facie* reasonabl or at any rate "the burden lies on the covenantor of showing tha it is unreasonable": *per* Chitty, J., *Badische Anilin und Sod Fabrik* v. *Schott, Segner & Co.*, [1892] 3 Ch. 447, at p. 451; bu in the following cases restraints, though limited as to duratio were held unreasonable: *Ward* v. *Byrne* (1839), 5 M. & W. 548 9 L. J. Ex. 14; 52 R. R. 827; *Hinde* v. *Gray* (1840), 1 Man. & G 195; 9 L. J. C. P. 253; 56 R. R. 330; *Baker* v. *Hedgecock*, *supr*

. 635; *Ehrman* v. *Bartholomew*, [1898] 1 Ch. 671; 67 L. J. h. 319.

Covenants held unreasonable.

On the other hand, the following covenants, though restricted in rea, business, or duration, have been held unreasonable: "not to ractise as a surgeon dentist at or within 100 miles of York": *'orner* v. *Graves* (1831), 7 Bing. 735; 5 M. & P. 768; 9 L. J. (o.s.) . P. 192; 33 R. R. 635, "not to follow or be employed in the busiess of a coal merchant for nine months": *Ward* v. *Byrne*, *supra*, . 636; "not during the continuance" of a term for which a rewery was demised "to carry on the business of a brewer or ıerchant or agent for the sale of ale, etc., in Sheffield or elsewhere, r in any other manner howsoever to be concerned in the said usiness": *Hinde* v. *Gray*, *supra*, p. 636; "not directly or ıdirectly to engage or employ himself in any other business or ·ansact any business with any other person or persons for a term f ten years": *Ehrman* v. *Bartholomew*, *supra*; "not either ɔlely or jointly with, or as manager or agent for, any other erson or persons or company, directly or indirectly, carry on or e engaged or concerned or interested in the business of a cider ıerchant, manufacturing chemist, or cordial compounder": *)owden & Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45; 73 L. J. K. B. 38.

"Not at any time during a period of seven years . . . either ı the United Kingdom of Great Britain or Ireland carry on either s principal agent or servant or otherwise alone or jointly or in ɔnnection with any other person, firm or company, or be conerned or assist directly or indirectly, whether for reward or otherise, in the sale or manufacture of pulley blocks, hand overhead ınways, etc., or any part thereof": *Morris, Ltd.* v. *Saxelby*, 1916] 1 A. C. 688; 85 L. J. Ch. 210. See also *Leetham & Sons, td.* v. *Johnstone-White*, [1907] 1 Ch. 322; 76 L. J. Ch. 304; *'vans* v. *Heathcote*, [1918] 1 K. B. 418; 87 L. J. K. B. 593.

"Not for a period of five years after the determination of this greement directly or indirectly, either as principal, agent, or ervant, either on his own account or for or on behalf of any other erson, sell to or offer for sale or be interested or concerned in ıe sale, or solicit orders for any goods or marketable commodity hatsoever from or call upon or have or be interested or concerned ı any business dealings and transactions with any brewers, ıstomers or persons from whom he may have obtained or solicited rders or upon whom he may have called whilst in the employ the employers": *Morris & Co.* v. *Ryle* (1910), 103 L. T. 545.

And if the contract is tyrannous, oppressive and unreasonable ıe Court will not enforce it, whether it be in restraint of trade not: *Hepworth Manufacturing Co.* v. *Ryott*, [1920] 1 Ch. 1;) L. J. Ch. 69.

"Not to engage in similar work" (*sc.* as an assistant micr scopist) "within a distance of ten miles from these laboratories" *Eastes* v. *Russ*, [1914] 1 Ch. 468; 83 L. J. Ch. 329.

Not to publish in any periodical published by the defendan any comment upon the plaintiff's land company, its director business or land, or upon any company with which the defendan had notice that the plaintiff's company was connected or co cerned: *Neville* v. *Dominion of Canada News Co., Ltd.*, [191 3 K. B. 556; 84 L. J. K. B. 2105.

Benefit of covenant assignable.

The benefit of covenants in restraint of trade is assignable wit and can be sued on by the covenantee's assignee of, the business *Benwell* v. *Inns* (1857), 24 Beav. 307; 116 R. R. 131; *Bain* v. *Geary* (1887), 35 Ch. D. 154, at p. 159; 56 L. J. Ch. 935; *Town end* v. *Jarman*, [1900] 2 Ch. 698; 69 L. J. Ch. 823, applying *Jacob* v. *Whitmore* (1883), 49 L. T. 335; but such covenants may be s framed as to be personal to the covenantee: *Davies* v. *Davi* (1887), 36 Ch. D. 359; 56 L. J. Ch. 962; and if entered into jointl with two persons, who have several interests, one alone can sue *Palmer* v. *Mallet* (1887), 36 Ch. D. 411; 57 L. J. Ch. 226.

A covenant "to retire from the partnership and so far as th law allows from the business, and not to trade, act, or deal in an way so as directly or indirectly to affect the continuing partners, was held too vague to be enforced, and to be personal to the co tinuing partners, and one which could not be sued on by the assignees: *Davies* v. *Davies* (*supra*).

How distance measured.

In measuring distance, where the covenant is not to carry o business within a certain distance, the measurement is to be mad as the crow flies, and from the nearest point of the house, whe the place from which the measurement is to be taken is a house *Mouflet* v. *Cole* (1872), L. R. 8 Ex. 32; 42 L. J. Ex. 8, where a the previous cases are collected.

What amounts to a breach.

Where A covenanted with B not to do, within a certain distri for other persons, any work or act usually done by solicitors, was held by Buckley, J., that writing and posting, outside th district, on instructions given outside the district, by perso residing outside the district, solicitors' letters to persons residin within the district was a breach of the covenant: *Edmundson* v *Render*, [1905] 2 Ch. 320; 74 L. J. Ch. 585, but a covenant n to "carry on within a radius of five miles of the Town Hall, Bren ford," the "profession of a solicitor" is not broken by the cov nantor, whose place of business was outside the prescribed are writing a letter on behalf of a client residing within that area i the interests of another person also living within the area: *Wood bridge & Sons* v. *Bellamy*, [1911] 1 Ch. 326; 80 L. J. Ch. 265.

As to whether a covenantor who, though having no place

usiness within the prohibited area, solicited customers in such rea, could be said to be "carrying on" a business and by so oing to be acting in breach of his covenant: see *Turner* v. *Evans* 1852), 2 De G. M. & G. 740; 22 L. J. Q. B. 412; 95 R. R. 312; 1853), 2 E. & B. 512; followed in *Hadsley* v. *Dayer-Smith*, [1914] . C. 979; 83 L. J. Ch. 770.

"Carrying on" a business.

In a covenant not to be "interested or concerned in" these ords must be interpreted in a business sense, having regard to he facts of the case: *Cory & Son, Ltd.* v. *Harrison*, [1906] A. C. 74; 75 L. J. Ch. 714.

"Interested or concerned in."

Reasonable covenants in restraint of trade may be enforced, hough entered into by an infant in an apprenticeship deed: *Gadd* . *Thompson*, [1911] 1 K. B. 304; 80 L. J. K. B. 272.

Infant.

If the trade sought to be protected is world-wide a world-wide ovenant is not too extensive: see *Ropeways, Ltd.* v. *Hoyle* (1919), 8 L. J. Ch. 446; 120 L. T. 538.

World-wide covenant.

CHAPTER XXXIII.

COVENANTS TO SETTLE PROPERTY.

Covenant only affects Interest mentioned in Covenant and not Different Interest: Covenants to Settle after-acquired Property Covenant that One shall Settle binds that One only : Covenan that Both shall Settle binds Both : Covenant that Propert shall be Settled binds Both : Agreement that Property shall b Settled binds Both : Agreement that One shall Settle binds tha One only : Effect of Recitals : Life Interests and Income no bound : Annuities : Accumulations of Income: Property subjec to Power: When Power Exercised: Power cannot be Exercise to Defeat Covenant : " Is now entitled " includes Reversionar Interests: Contingent Interests : Defeasible Interests : " Sha become entitled " means during Coverture when applied t Wife's Property: Secus as regards Husband's Property: Word of Future Acquisition require some Change of Interest : Veste Reversion not falling into Possession not Bound: Vested Reve sion falling into Possession is Bound : Contingent Interest ves ing in Possession is Bound : Contingent Interest vesting i Interest only not Bound : If there is no Change Property no Bound : Property to which Covenantor has no Title if acquire in Possession is Bound : If acquired in Reversion is Bound : I acquired in Contingency is probably Bound : Named Minimum Value : " At any one time ": Successive Appointments o Several Sums : Effect of Married Women's Property Acts Property given with Direction not to Settle: Covenant to Sett severs Joint Tenancy: Infant's Covenant is Voidable, not Void Covenant cannot be Enforced by Volunteers: Covenants t Leave by Will.

NOTWITHSTANDING the rule in equity, that a person who con tracts to convey, mortgage, or sell property and afterwards acquire such a title as enables him to carry out his contract, is boun to do so : *Taylor* v. *Debar* (1675), 1 Ch. Ca. 274; *S. C. sub nom Taylor* v. *Dabar*, 2 Ch. Ca. 212; *Seabourne* v. *Powell* (1686), Vern. 11; *Morse* v. *Faulkner* (1792), 1 Anst. 11; 3 Swanst. 429 note; *Noel* v. *Bewley* (1829), 3 Sim. 103; *Jones* v. *Kearney* (1841 1 Dr. & War. 134; 58 R. R. 249; *Smith* v. *Baker* (1842), 1 Y. Coll. Ch. C. 223; *Re Hoffe's Estate Act*, 1885 (1900), 82 L. T. 556

Bridgwater's Settlement, [1910] 2 Ch. 342; 79 L. J. Ch. 746; *Harper's Settlement*, [1919] 1 Ch. 270; 88 L. J. Ch. 245, which ter case shows that the principle enunciated in *Noel* v. *Bewley* *upra*) was the correct principle but was wrongly applied to the ts in that case; it is a rule that—

If A covenants to settle a particular interest in property, and afterwards becomes entitled to a different interest in the same property, he is not bound to settle such different interest.

Where covenantor acquires a different interest, it need not be settled.

Thus A, being possessed of a lease for years, covenanted in a ed making a family provision that, if he should die during the ntinuance of the term of the lease, his executors should assign residue of the term to B. A afterwards purchased the reversion fee and died. *Held*, that the covenant did not preclude A from rchasing the reversion, and that his executors were not liable for breach of the covenant: *Williamson* v. *Butterfield* (1800), Bos. & P. 63.

A, being under her parents' marriage settlement tenant in tail remainder of certain lands, expectant on the failure of issue le of her brother, agreed in her own marriage settlement, which ited the former, that, "in case she shall become entitled to any h estate, part, or share, as aforesaid," it should be conveyed to uses of the settlement. The brother suffered a recovery and d intestate, whereupon she inherited one-fourth of the lands as of his four co-heiresses. *Held*, that the covenant did not affect fee simple so coming to her by descent: *Tayleur* v. *Dickenson* 826), 1 Russ. 521.

A, being entitled under the will of B to a contingent remainder land, by settlement reciting his title, covenanted that when and soon as "the said remainder" should become vested in him in session, he would settle it. The lands were disentailed by ants in tail under the prior limitations of the will, and ultitely came to A by descent and devise from them. *Held*, that covenant did not affect the fee simple thus acquired by him, smuch as he never acquired a vested interest in the remainder ler the will of B: *Smith* v. *Osborne* (1857), 6 H. L. C. 375.

A fund was settled for children as their mother should appoint, in default for them equally. Part was appointed to a son, who eed to settle it "and all other his part, share and interest, as vested as contingent" in the fund. *Held*, that the residue of fund, which was afterwards appointed by the mother to the was not bound by the covenant: *Childers* v. *Eardley* (1860), Beav. 648; 126 R. R. 279.

A, being entitled to an interest under a will in certain fund by her marriage settlement assigned " all the share to which s then was or might become entitled by accruer, survivorship otherwise " in the specified funds. *Held*, that a share in the fun taken by her under the will of her father, who had become entitl thereto, was not affected by the settlement: *Parkinson* v. *Das wood* (1861), 30 Beav. 49; 132 R. R. 177.

The five children of a testator were absolutely entitled to residue. One of them, on her marriage, settled her fifth of su residue, and " all other her share by survivorship or otherwise, a all her right, contingent, reversionary or other interest, possibilit claim, and demand therein." She afterwards became entitled to further share by the death of a brother intestate. *Held*, that was not included in the settlement: *Edwards* v. *Broughton* (186 32 Beav. 667; 138 R. R. 905.

The rule was applied to a case where the settlor was the o child entitled in default of appointment, and took the whole fu under an appointment to herself, and the settlement contained actual assignment, and not only a covenant to settle: *Lovett* *Lovett*, [1898] 1 Ch. 82; 67 L. J. Ch. 20; and to a case where t covenant was to settle " all her half or other share and inter whatsoever ": *Re Maddy's Estate*, [1901] 2 Ch. 820; 71 L. Ch. 18; following *Sweetapple* v. *Horlock* (1879), 11 Ch. D. 74 48 L. J. Ch. 660.

Covenants in marriage settlements to settle after-acquired property.

Questions on the construction of covenants for the settleme of property, not specifically mentioned, most frequently arise marriage settlements, which often contain covenants for the sett ment of the present or after-acquired property of the wife, a such covenants take the form, either that the husband or wife, both, shall settle such property, or that such property shall settled.

Two questions therefore may arise for determination: (i), w is bound by the covenant, and (ii), what property is within covenant.

With regard to the first question, viz.: who is bound by covenant, it may be laid down that—

Covenant by one that he or she will settle binds that one only, but that both will settle, or that property shall be settled, binds both.

> A covenant that the covenantor will settle o binds the party who enters into the covenant, b a covenant, though by one party only, that bo will settle, or that property shall be settled, bi both, if both are parties to the deed.

" It is quite settled that a covenant by the husband alone settle the after-acquired property of the wife does not bind

parate property, but that if the covenant be by both, then it es bind it" : *per* Romilly, M.R., *Coventry* v. *Coventry* (1863), Beav. 612, at p. 614; 138 R. R. 883.

Husband's covenant does not bind separate estate.

A covenant by the husband only that he will settle does not nd the following property :

(i) Property to which the wife becomes entitled for her separate e : *Douglas* v. *Congreve* (1836), 1 Keen, 410, at p. 423; 6 L. J. . 51; 44 R. R. 103; *Thornton* v. *Bright* (1836), 6 L. J. Ch. 121; My. & C. 230; 45 R. R. 36; *Travers* v. *Travers* (1840), 2 Beav. 9; 50 R. R. 151; *Drury* v. *Scott* (1840), 4 Y. & C. Ex. 264; *ammond* v. *Hammond* (1854), 19 Beav. 29; 105 R. R. 54; *Grey Stuart* (1860), 2 Giff. 398; 30 L. J. Ch. 884; 128 R. R. 163; *itaker* v. *Reynardson* (1865), 13 W. R. 487; 12 L. T. (N.S.) 134; 5 R. R. 773.

(ii) Reversionary interests of the wife's which do not fall into ssession during the coverture, so that the husband cannot reduce em into possession : *Young* v. *Smith* (1865), 35 Beav. 87; L. R. Eq. 180; 147 R. R. 39.

Reversionary property.

(iii) Equitable choses in action to which the wife becomes titled in possession during the coverture, but which are not duced into possession by the husband during the coverture.

Equitable choses in action.

Thus a husband covenanted to settle, when required, one piety of the wife's reversionary interests under a will; after the ath of the tenant for life, he reduced one moiety into possession, d gave a release for it, but never settled it; the other moiety mained with his consent standing in the names of the executors til he died, in the lifetime of the wife, having by his will given his property to her; it was held that the wife was not bound settle the moiety which had not been assigned by the executors, uart, V.-C., saying : "There is nothing strong enough to defeat r title. There was no assignment upon any trust, no covenant her, and the articles are merely executory, and are not binding on her" : *Cramer* v. *Moore* (1855), 3 Sm. & G. 141; 3 W. R. 7; 25 L. T. (O.S.) 31; 107 R. R. 56; *Re Webb's Trusts* (1877), L. J. Ch. 769.

A covenant by the wife that she will settle binds property to ich she becomes entitled for her separate use : *Tawney* v. *Ward* 339), 1 Beav. 563, at p. 568; *Milford* v. *Peile* (1854), 17 Beav. 2; 2 W. R. 181; 99 R. R. 306, where the words were "all perty which should come to her absolutely, and not bound by y trust or provision otherwise than for her absolute use"; *Re nutt* (1882), 22 Ch. D. 275; 52 L. J. Ch. 299; unless it be tled without power of anticipation, *per* Romilly, M.R., in *ventry* v. *Coventry* (1863), 32 Beav. 612, at p. 614; or unless husband's interest only in the wife's property is covenanted

Wife's covenant binds separate estate.

Unless restraint on anticipation,

to be settled: *Brooks* v. *Keith* (1861), 1 Dr. & Sm. 462; 1 R. R. 189; or unless there is an exception of property "alrea settled to her separate use": *Coventry* v. *Coventry* (*supr* p. 643; *Whitgreave* v. *Whitgreave* (1864), 33 Beav. 532; or exception of property "otherwise settled": *Kane* v. *Kane* (188 16 Ch. D. 207; 50 L. J. Ch. 72; *Re Berens' Trusts* (1888), L. T. 626; or "except only such estate and effects as shall settled on her for her separate use": *Lloyd* v. *Prichard*, [190 1 Ch. 265; 77 L. J. Ch. 183.

or exception of property, settled to separate use,

or otherwise settled.

Covenant by husband that wife would settle,

In *Re De Ros' Trusts* (1885), 31 Ch. D. 81; 55 L. J. Ch. Kay, J., held that the wife was bound where there was a covena by the husband that he and the wife would settle, and until sett ment stand possessed of the property upon the trusts of t settlement, but the construction was assisted by the reci of an agreement that property devolving on the wife shou be settled; and in *Re Haden*, [1898] 2 Ch. 220; 67 L. Ch. 428, Stirling, J., held that the wife was bound by covenant by the husband that her property should be settle and a contingent reversionary interest to which the wife w entitled and which was not given for her separate use, was caug by a covenant by husband and wife to settle, though such inter did not fall into possession during the coverture: *Lloyd* v. *Pricha* (*supra*).

or that property should be settled.

Where the wife was an infant, and the settlement recited th it had been agreed that the property, both real and person should be settled, and that the husband should enter into t covenant therein mentioned, and the husband covenanted th "in case the wife would voluntarily consent thereto, but not oth wise," he and she would settle. *Held*, that such consent appl to realty only, and that personalty must be settled even witho her consent: *Re Daniel's Trust* (1853), 18 Beav. 309.

Rule in *Howe* v. *Earl of Dartmouth*.

The rule in *Howe* v. *Earl of Dartmouth* (1802), 7 Ves. 1 6 R. R. 96, does not apply in the case of a settlement by dee *Re Van Straubenzee*, [1901] 2 Ch. 779; citing *Milford* v. *P* (*supra*, p. 643). See also *Hope* v. *Hope* (1855), 1 Jur. (N.S.) 7

Where the words are words of agreement and not of coven the following rule may be laid down—

Agreement that property shall be settled, binds both, but that one party shall settle binds that party only.

> An agreement and declaration that both part shall settle, or that property shall be settled, binding on both husband and wife; but an agr ment and declaration that one party only sh settle, or concur with the other in settling proper does not bind the other party; and the operation

this rule is not affected by the addition of a covenant by one party only to settle or concur in settling the property.

"It appears to me that in effect the words 'It is hereby further greed and declared' operate thus: they operate to show that what comprised in the clause of which these words are the commence- ıent is what all parties intend and agree shall be done, and what- ver you find in the clause is agreed to be done by any given party is an agreement that that party is to do it, but the party who to do the thing is the person who is alone bound to perform hat agreement": *per* Kindersley, V.-C., *Ramsden* v. *Smith* 1854), 2 Drew. 298, at pp. 307 and 308; 23 L. J. Ch. 757; 100 L. R. 147.

"In all the cases of clauses in marriage settlements as to the ettlement of future property, three distinct questions arise: And . . all the cases turn upon one or more of these different questions, amely—Whose covenant is it? Who is bound? Who has ntered into the covenants? The second is, having ascertained ho has entered into the covenant—By whom is the act to be one? And the third—What is the property which is included in he covenant, and is to be affected by the act to be done? . . . Now I apprehend that, whenever the covenant or agreement is imply and in terms the covenant and agreement of the husband, he husband only is bound; and some of the cases decided turned pon that distinction. But where the covenant in terms is not mere exclusive covenant of the husband, but is an agreement etween all the parties, which agreement, being under seal, is in oint of fact a covenant by all the parties, then it is not merely imited to a covenant by the husband, but all parties who have ntered into that agreement are bound to perform it. . . . In this ase . . . there is a special covenant on the part of the husband, ut, as it appears to me, not superseding the effect of that which the general covenant comprised in the general agreement among ll the parties. But although that is a general agreement, and in hat sense a covenant . . . it does not mean that every party to he deed has bound himself and made himself responsible for the ct to be done, because, as may be very justly observed, . . . rustees are under no responsibility that they will do the act to e done; or that, if it is not done, they will make good what ought o have been done. But the meaning of it is that these words xpress what [it] is the intention and agreement of all parties hall be done by somebody, but not at all meaning to express y whom the act is to be done which the parties have agreed and ntended shall be done": *per* Kindersley, V.-C., *Townshend* v.

Agreement between all parties.

Harrowby (1858), 27 L. J. Ch. 553, at p. 566; 4 Jur. (N.S.) 35
6 W. R. 413; 31 L. T. (O.S.) 33; 114 R. R. 545.

In *Campbell* v. *Bainbridge* (1868), L. R. 6 Eq. 269; (37 L. J
Ch. 634), the words being "It is hereby declared and agreed, an
the said (husband) doth covenant that" the property should b
settled, Stuart, V.-C. (at p. 273), said: "It seems to me ver
clear that where the covenant is by the husband alone, the word
previously inserted, that 'it is hereby declared and agreed
amount only to a declaration and agreement that all parties a
agreed that the husband shall covenant. But where it is declare
and agreed—that is, by all the parties, including the wife—tha
property which may come to her for her separate use, free fro
the control of her husband, shall be settled, the case is clear. . .
I cannot read the words of this clause without seeing that h
separate property and her separate agreement are a substanti
and integral part of this clause, and that it is an agreement b
all the parties, including the wife, that the wife should do som
thing": the V.-C. then distinguished *Ramsden* v. *Smith* (1854
2 Drew. 298, and remarked that, in that case, Kindersley, V.-C
"rested his judgment upon this, that the person who alon
according to the terms of the clause, was to do anything, was th
husband."

Effect of agreement and declaration by parties.

"The rule is that where you have such words as 'it is hereb
agreed and declared between and by the parties to these presents
that some one will do an act, or make a payment, and that son
one is a party to the deed, it is a covenant by him with the other
not a covenant by all of them. . . . If we find that no act is to b
done except by one of the parties, these words amount only to
covenant by that one party with the others": *per* Jessel, M.R
Dawes v. *Tredwell* (1881), 18 Ch. D. 354, at p. 359.

Recitals do not restrict or extend the covenant if clear.

In cases falling under the first branch of the rule, a recital
general terms of an agreement "that the husband shall settle
the property, will not restrict the generality of the agreement
the operative part of the deed: *Willoughby* v. *Middleton* (186
2 J. & H. 344; 6 L. T. (N.S.) 814; 31 L. J. Ch. 683; 134 R. R
247; and in cases falling under the latter branch of the rule
recital in general terms of an agreement that the property "sha
be settled," will not enlarge a covenant by the husband in th
operative part that "he will settle" it: *Hammond* v. *Hammo*
(1854), 19 Beav. 29; 105 R. R. 54; *Young* v. *Smith* (1865), L. R
1 Eq. 180; 35 Beav. 87; 147 R. R. 39; *Dawes* v. *Tredwell* (188
18 Ch. D. 354; provided that in each case the operative wor
are unambiguous.

Agreement by both and covenant by

Where there was an agreement by all parties and a covena
by the husband alone that the property should be settled, t

ife, after her husband's death, was held bound to settle a reversionary chose in action to which she became entitled during the overture, but which did not fall into possession until after the husband's death: *Butcher* v. *Butcher* (1851), 14 Beav. 222; 92 R. R. 81; *Re D'Estampes* (1884), 32 W. R. 978, where the prior ases are reviewed, and *Reid* v. *Kenrick* (1855), 3 W. R. 530; 1 ur. (N.S.) 897; 24 L. J. Ch. 503; 25 L. T. (O.S.) 193; 101 R. R. 75, stated *infra*, is distinguished; *Viditz* v. *O'Hagan*, [1900] 2 h. 87, at p. 93; 69 L. J. Ch. 507; and the wife was held bound o settle her separate property: *Willoughby* v. *Middleton* (*supra*, . 646) (more fully stated *per* Lord Selborne, C., in *Codrington* . *Lindsay* (1872), L. R. 8 Ch. 578, at p. 590; 42 L. J. Ch. 526); *ampbell* v. *Bainbridge* (1868), L. R. 6 Eq. 269; 37 L. J. Ch. 34; *Smith* v. *Lucas* (1881), 18 Ch. D. 531; and in *Caldwell* v. *ellowes* (1870), L. R. 9 Eq. 410, James, V.-C., held that recitals hat property should be settled, and that the husband should enter nto a covenant for settling it, followed by a covenant by the husband alone that the property should be settled, and that he would settle it, operated to sever the joint tenancy of the wife n her freeholds.

husband that property shall be settled binds wife.

In *Stevens* v. *Van Voorst* (1853), 17 Beav. 305; 99 R. R. 162, t was agreed and declared between and by the parties, and the husband covenanted, that they the said husband and wife and each of them, would settle the wife's after-acquired property. *Held*, that this was a covenant by the wife as well as the husband [and therefore property acquired by her after her husband's death must be settled by her; which conclusion is not now law; *infra*, p. 651].

Agreement, and covenant by husband that both shall settle binds both.

The decision in *Stevens* v. *Van Voorst* that the wife was bound is probably correct, as there was an agreement that the husband and wife would settle, and therefore the case is within the rule stated *supra* on p. 644, and it is consistent with *Re De Ros' Trusts* (1885), 31 Ch. D. 81, stated *supra*, p. 644; but in *Reid* v. *Kenrick* (*supra*), where the words were: "It is hereby agreed and declared by and between the said parties hereto, and the said R (husband), doth hereby covenant, that the after-acquired property shall be and remain, and he the said R will permit and suffer the same to be and remain upon the trusts of the settlement, and that he the said R will pay, transfer, and deliver over, and join with the said (wife) in assigning, conveying, and assuring" such property, Stuart, V.-C., distinguished *Stevens* v. *Van Voorst* (*supra*), and held that it was impossible to say that, upon the construction of the instrument, there was any covenant on the part of the wife, and accordingly that a reversionary chose in action which fell into possession after the husband's death, was not bound. (*Sed quaere.*

The terms of the settlement are peculiar, and seem to amount t an agreement by all parties, first, that the property should b settled, and secondly, that the husband should settle it.)

Agreement and covenant by husband that he will settle does not bind wife.

But where there was an agreement and declaration, and covenant by the husband only, that " he will settle, or concu with the wife in settling " the property, it was held that the wif was not bound to settle property given to her separate use *Ramsden* v. *Smith* (1854), 2 Drew. 298; *Dawes* v. *Tredwell* (1881) 18 Ch. D. 354.

Specific property,

It was, however, held in *Lee* v. *Lee* (1876), 4 Ch. D. 175; 4 L. J. Ch. 81, by Jessel, M.R., that a covenant by a husband tha he would settle a *specific property* belonging to his wife containe in an ante-nuptial agreement, to which the wife was a party, boun the wife.

What property is bound.

With regard to the second question, *viz.*, what property i within the covenant; the covenants in question sometimes refe to present as well as future property, and sometimes only to futur property.

Husband's property.

Although such covenants usually relate to property of the wife a man can covenant to settle all his after-acquired property o every description, " except business assets." Such a covenan was held good against creditors in *Re Reis, ex p. Clough*, [1904 2 K. B. 769; 73 L. J. K. B. 929; overruling *Re Clint, ex p Bolland* (1873), L. R. 17 Eq. 115; 43 L. J. Bky. 16.

Husband's interest in wife's property.

Such covenants, when relating to the wife's property, some times apply to the property, and sometimes only to the husband' interest in such property.

Life interest or income is not bound.

The presumption is that the covenant does no extend to a life interest, or a life annuity, or t income; (and estates tail are not within the cove nant: *Hilbers* v. *Parkinson* (1883), 25 Ch. D. 200 53 L. J. Ch. 194; *Re Dunsany's Settlement* [1906] 1 Ch. 578; 75 L. J. Ch. 356).

Husband's income and life interest.

In *Lewis* v. *Madocks* (1810), 17 Ves. 48; (7 R. R. 10), wher the covenant was to settle the husband's after-acquired property Lord Eldon, C. (at p. 55), said that he could not adopt the con struction that annual produce, for instance dividends of stock was property acquired during the coverture in the sense of th bond [except only to the extent to which the husband himsel might think proper to lay up that produce as capital, as to which however, see *per* Romer, J., *Finlay* v. *Darling*, [1897] 1 Ch. 719 at p. 722; 66 L. J. Ch. 348].

In *White* v. *Briggs* (1848), 22 Beav. 176 n.; 111 R. R. 317

ıd in *St. Aubyn* v. *Humphreys* (1856), 22 Beav. 175; 111 R. R. 6, it was held that a life interest acquired by the husband, who ıd covenanted to settle his after-acquired property, was not ›und by the covenant.

Wife's life interest.

The rule was applied to income given to the wife for her separate e in *Duncan* v. *Cannan* (1855), 21 Beav. 307; 111 R. R. 103, in hich case the life interest was for separate use with restraint on ıticipation, but it was stated that the fact that it was so was ımaterial.

In *Townshend* v. *Harrowby* (1857), 4 Jur. (N.S.) 353; 27 . J. Ch. 553; 6 W. R. 413; 31 L. T. (O.S.) 33, it was held that 'e interests, whether for the wife's separate use or not, are not tended to be included so as to fall into the trust property as apital: *Fyfe* v. *Arbuthnot* (1857), 1 De G. & J. 406; 26 L. J. ı. 646; 118 R. R. 151; but in *Brooks* v. *Keith* (1861), 1 Dr. & n. 462, where the wife became entitled to a life interest in lease-›lds, with a proviso of forfeiture on alienation, Kindersley, V.-C., ems to have thought that the life interest was bound, since, ıough he inclined to think that an assignment on the trusts of ıe settlement would not be a forfeiture, he declined to order the ife to run the risk: this case is discussed by Chitty, J., in *Re llnutt* (1882), 22 Ch. D. 275, at p. 280; 52 L. J. Ch. 299.

Life interest forfeitable on alienation.

In *Forster* v. *Davies* (1861), 4 De G. F. & J. 133; 31 L. J. h. 276, a life interest without power of anticipation was held not be bound.

Annuity.

An annuity acquired by the wife was held not to be within the ›venant in *Re Dowding's Settlement Trusts*, [1904] 1 Ch. 441; 3 L. J. Ch. 194, distinguishing *Scholfield* v. *Spooner* (1884), 26 h. D. 94; 53 L. J. Ch. 777, on the ground that in the latter ıe annuity "was clearly intended to be included in the covenant, ıd therefore it must be brought within the settlement, and held ›on some trusts or other": *per* Kekewich, J., in *Re Dowding upra*), at p. 450. (*Re Dowding* was itself distinguished in *Re utler*, [1916] 1 Ir. Rep. Ch. 66, on the grounds that in the latter ıse there was not a bequest of an annuity, but a direction to ›ply the balance of a moiety of residuary estate in the purchase an annuity); and accumulations of income are not bound: *Finlay Darling* (*supra*, p. 648) (dissenting from *Re Bendy*, [1895] Ch. 109; 64 L. J. Ch. 170); *Re Clutterbuck's Settlement*, [1905] Ch. 200; 73 L. J. Ch. 698; and *Mackenzie* v. *Allardes*, [1905] . C. 285, *per* Lord Davey, at p. 296.

Accumulations of income.

Property over which the covenantor has merely a power of appointment is not bound by the covenant, unless expressly included therein: *Ewart* v.

Property subject to power of appointment is not bound.

Ewart (1853), 11 Ha. 276; 90 R. R. 690; *Tow*
shend v. *Harrowby* (1858), 4 Jur. (N.S.) 353; 2
L. J. Ch. 553; 6 W. R. 413; 31 L. T. (O.S.) 3
Bower v. *Smith* (1871), L. R. 11 Eq. 279; 1
W. R. 399; 40 L. J. Ch. 194; *Tremayne* v
Rashleigh, [1908] 1 Ch. 681; 77 L. J. Ch. 36

But appointed interests are bound.

But if the covenantor appoint to himself or herself an intere
that falls within the covenant, such interest will be bound: *Ewa*
v. *Ewart* (*supra*); if in default of appointment the property
given to the covenantor, the property is not bound, and t

When power can be exercised to defeat the covenant.

covenantor can exercise the power so as to defeat the operation
the covenant: *Tremayne* v. *Rashleigh* (*supra*), not following *
O'Connell, [1903] 2 Ch. 574; 72 L. J. Ch. 709; and, of cours
the covenant may be so worded as to include property over whi
the covenantor has a general power of appointment by deed: *
Anstis (1886), 31 Ch. D. 596, at p. 604; but a covenant to exerci

Power exercisable by will only.

in favour of the trustees a general power exercisable by will on
does not bind the property and cannot be specifically enforce
but damages can be given for the breach thereof, and if the pow
be exercised the appointed funds are assets for payment of su
damages: *Re Parkin*, [1892] 3 Ch. 510; 62 L. J. Ch. 55.

It may be observed that in *Tremayne* v. *Rashleigh* (*supr*
Bower v. *Smith* (*supra*) was not relied upon by Eve, J., and w
distinguished from the former case in that the gift over in defau
of appointment in the latter case went to a stranger.

Property to which covenantor "is now entitled" or "at date of marriage shall be entitled" includes reversionary interests.

Where the covenant includes property to whi
the covenantor "is now entitled," or "at the tin
of the marriage shall be entitled," all reversiona
interests, whether vested or contingent, to whi
the covenantor is entitled at the date of the settl
ment or marriage, as the case may be, are boun

Vested reversion.

The rule applies to a vested reversion: *Re Mackenzie's Sett*
ment (1867), L. R. 2 Ch. 345; 36 L. J. Ch. 320; *Caldwell*
Fellowes (1870), L. R. 9 Eq. 410; *Davenport* v. *Marshall*, [190
1 Ch. 82; 71 L. J. Ch. 29. (*Dering* v. *Kynaston* (1868), L.
6 Eq. 210, which is *contra*, cannot be supported: see *per* Mali
V.-C., *Agar* v. *George* (1876), 2 Ch. D. 706, at p. 709, and *p*
Jessel, M.R., *Re Jackson's Will* (1879), 13 Ch. D. 189, at p. 19
49 L. J. Ch. 82.)

Contingent interest.

The rule applies to a contingent interest, even if such inter
does not fall into possession till after the termination of the cov

re: *per* Turner, L.J., *Re Mackenzie's Settlement* (*supra*), at 348, where he says: "The terms of the covenant are 'if she is, if she becomes, entitled to property of the value of £400 for ıy estate or interest whatsoever.' Could it be said that if she as entitled contingently, or under an executory devise or bequest, property of a larger value, the covenant would not reach it?" *gar* v. *George* (*supra*), and *Cornmell* v. *Keith* (1876), 3 Ch. D. 37; 45 L. J. Ch. 689, are authorities to the same effect.

Defeasible interest.

The rule applies to a reversionary interest liable to be divested the exercise of a power of appointment: *Re Jackson's Will* (*supra*); *Sweetapple* v. *Horlock* (1879), 11 Ch. D. 745; 48 L. J. n. 660; but if the reversionary interest is divested by the exercise a power of appointment, and the property appointed absolutely the wife after the termination of the coverture, the property is ot within the covenant: *Sweetapple* v. *Horlock* (*supra*), overıling *Re Frowd's Settlement* (1864), 4 N. R. 54; 10 L. T. (N.S.) 37; 142 R. R. 776.

Half-pay.

A covenant to settle "property" to which the settlor "is ıtitled" does not include the half-pay of a lieutenant in the avy, which is not "strictly property of any kind or description, ıt only his chance of earning future wages": *Churchill* v. *Denny* 1875), L. R. 20 Eq. 534.

Where the husband covenanted to settle the share of his wife ıd himself "in her right" under her grandfather's will, it was eld that this meant property which the wife, but for the marriage, ould have taken, and therefore an interest given to the husband imself was not bound: *Ibbetson* v. *Grote* (1858), 25 Beav. 17; 19 R. R. 319.

"Shall become entitled" means during coverture, *qua* wife's property;

In the absence of special words, a covenant to settle property "to which the wife shall become entitled" will be construed to mean "shall become entitled during the coverture": *Re Edwards* (1873), L. R. 9 Ch. 97; 43 L. J. Ch. 265; approving *Dickinson* v. *Dillwyn* (1869), L. R. 8 Eq. 546; 39 L. J. Ch. 266; and *Carter* v. *Carter* (1869), L. R. 8 Eq. 551; 39 L. J. Ch. 268; and overruling on this point *Stevens* v. *Van Voorst* (1853), 17 Beav. 305; even if the covenant relates only to property coming from a specific source: *Re Campbell's Policies* (1877), 6 Ch. D. 686; 46 L. J. Ch. 142.

even if from specific source.

Contra qua husband's property.

A similar covenant as to the husband's propert is not so construed.

Wife's property.

"The primary object of a covenant to settle the future pr perty of a wife is to prevent its falling under the sole control the husband, and it therefore, *prima facie*, is to be supposed n to be intended to apply to property the wife's title to which do not accrue until after the husband's death": *per* James, L.J *Re Edwards* (1873), L. R. 9 Ch. 97, at p. 100.

"The arguments which have been addressed to me in favo of construing a clause like this to include property coming to t lady after the determination of the coverture, are not sufficient induce the Court so to extend its operation. On the contrary, think that such a construction would in all probability not car out the intention of the parties. It might have the effect rendering impossible any settlement upon the children of a seco marriage, and of leaving them totally unprovided for. A settl ment upon a first marriage having such operation would be in t highest degree improvident; for the lady might soon become widow, and thus, if the covenant were held to extend over t whole period of her life, all her fortune might go to the sing child of a first marriage, to the entire exclusion of numero children of a subsequent marriage": *per* Hall, V.-C., *Re Cam bell's Policies* (V. P. 651), at p. 690. *Re Coghlan*, [1894] 3 Ch. 7 63 L. J. Ch. 671, is to the same effect.

Husband's property.

In *Prebble* v. *Boghurst* (1818), 1 Swanst. 309, where the co dition of a bond on marriage was "If the said (husband) shou at any time during his natural life become seised," etc., the wor were given their natural meaning, and land of which he becan seised after the death of his wife was held to be bound; and *Fisher* v. *Shirley* (1889), 43 Ch. D. 290; 59 L. J. Ch. 29, a covena by the husband to settle his wife's property was held to inclu property which he acquired after her death.

Judicial separation.

A decree for judicial separation terminates the coverture so f as regards property devolving upon the wife after the date there as 20 & 21 Vict. (1857), c. 85, s. 25 (*a*), enacts that "in every ca of a judicial separation the wife shall from the date of the sentenc and while the separation shall continue, be considered as a *fem sole* with respect to property of every description which she ma acquire or which may come to or devolve upon her": *Dawes Creyke* (1885), 30 Ch. D. 500; 54 L. J. Ch. 1096; *Davenport Marshall*, [1902] 1 Ch. 82.

By a marriage settlement it was expressly agreed that if t wife "during the then intended coverture," or her husband

(*a*) See now Supreme Court of Judicature (Consolidation) Act, 1925.

er right, should at one and the same time and from the same urce become entitled to any property, real or personal, of the alue of £200 or upwards, the same should be settled. The arriage took place, and subsequently a decree *nisi* was pro-ounced for dissolution of the marriage, and between the decree *isi* and the decree absolute the wife became entitled to property. *eld*, that the funds so falling into possession were bound by the ovenant: *Sinclair* v. *Fell*, [1913] 1 Ch. 155; 82 L. J. Ch. 105.

Legacy saved from lapse by existence of children.

Where the covenant was for the settlement of property coming o or vesting in the wife or the husband in her right during the overture, it was held that a legacy given to the wife by her father, hich was saved, by her leaving issue, from lapse on her death n his lifetime, was not bound by the covenant: *Pearce* v. *Graham* 1863), 11 W. R. 415; 32 L. J. Ch. 359; 139 R. R. 339.

Spes successionis.

And a mere *spes successionis*, such as her hope of succession to share of her husband's personal estate under the Scots Law, is ot bound by the covenant: *Re Simpson*, [1904] 1 Ch. 1; 73 L. J. h. 53. And see *Re Mudge*, [1914] 1 Ch. 115; 83 L. J. Ch. 243; *Re Parsons* (1890), 45 Ch. D. 51; 59 L. J. Ch. 666; *Re Green*, 1911] 2 Ch. 275; 80 L. J. Ch. 623.

What property is within words descriptive of future acquisition only.

Where the words of the covenant apply only to "property to hich the wife shall become entitled," they clearly do not bind roperty to which the covenanting party is already entitled in ossession; and they clearly do bind property which the wife cquires in immediate possession during the coverture, and to hich she had no title of any kind at the date of the marriage.

But greater difficulty arises in applying words of future acqui-ition to property in which the wife has already, at the time of he marriage, a reversionary interest which vests in possession, r a contingent interest which vests in interest only, during the overture, and the governing principle of the cases seems to be hat, in order to satisfy words of future acquisition, there must be, fter the marriage and during the coverture, some change of title, r fresh acquisition of interest in the property in question.

There must be some *change* in title during coverture.

"The law on this subject is in a very embarrassing state, and he decisions are in fact irreconcilable. . . . It must be taken as lear on principle and authority, that such a covenant, where the ords are future, does not affect present property. The judg-ment of James, V.-C., in *Re Pedder's Settlement Trusts* (1870), L. R. 10 Eq. 585; 40 L. J. Ch. 77, represents, I conceive, quite ccurately the law as deduced from the cases cited before him. There can be no doubt that a covenant like the present applies exclusively to interests which the parties may acquire a title to after marriage, distinct from those vested in them at the time of marriage, and that there must be some change or other in the

title to the property after marriage in order to bring it withi the covenant. This change is described in the covenant by th words ' become entitled to.' The expression ' become entitled to in these and most covenants of the sort, applies, I conceive, onl to an acquisition of interest by the wife; and this may mean (i) a acquisition of property in which the wife had no interest at th time of the marriage, and which vests in her absolutely during th coverture; or (ii) an acquisition of property which she wa entitled to in remainder at the time of marriage, and which vest in possession during the coverture; or (iii) an acquisition of pro perty in which she had no interest at the time of the marriage which vests in her by way of future title during the coverture, bu does not vest in possession till it is determined. There can b no doubt that the first of these three classes is within the cove nant; the difficulty arises with regard to the other two classes Both of them cannot be included within the covenant, and th question is, which of them is, *prima facie*, to be considered as s included " : *per* Wickens, V.-C., *Re Clinton's Trust* (1872), L. R 13 Eq. 295, at p. 304; 41 L. J. Ch. 191.

"Become entitled to."

Enumeration of titles.

The titles, therefore, which may be acquired after the date o the marriage and during the coverture are: (i) Acquisition i possession of property to which the wife had a title in reversion vested or contingent, at the date of the marriage; (ii) The vestin in interest, but not in possession, of property, in which she had contingent interest at that date; (iii) Acquisition in possession o property, in which she had no interest at that date; and (iv) Acqu sition of a reversionary title (vested or contingent) to property in which she had no interest at that date. These different classe of acquisition of title are discussed hereafter, but the cases i which there has been no change of title are first considered.

Property of wife in possession at date of settlement is not bound.

Property to which the wife is entitled i possession at the date of the marriage is not boun by the covenant where the subject-matter of th covenant is described by words applicable to futur acquisition by the wife only.

Thus property to which the wife was entitled in possession wa not bound by a covenant to settle " such personal estate as sha become vested in or accrue to her " : *Hoare* v. *Hornby* (1843), Y. & C. C. C. 121; 12 L. J. Ch. 151; 60 R. R. 73; or " all an singular the personal estate to which the said (*wife*) shall at an time or times become entitled " : *Otter* v. *Melvill* (1848), 2 D G. & Sm. 257; 17 L. J. Ch. 345; 79 R. R. 203; or " all and ever the estate and effects, of what nature and kind soever, whethe

al or personal, to which the said (*wife*) at any time during the id intended coverture shall become seised, possessed of, or ıtitled unto": *Wilton* v. *Colvin* (1856), 3 Drew. 617; 25 L. J. h. 850; 100 R. R. 464.

Half-pay.

By a marriage settlement it was agreed that A, the husband, ıd all other necessary parties, should settle all property to which he now is, or shall, during the intended coverture become ıtitled." At the time of his marriage he was in receipt of half-ay as a naval officer; but afterwards, during the coverture, he ɔmmuted it and received the commutation money. *Held*, that ıe commutation money was not bound by the covenant; for the alf-pay was not strictly "property," nor was it (at law) assign-ble property; and therefore it did not fall within the words of ıe covenant; and the fact of commuting, *i.e.*, selling it, did not ake a new acquisition of title to the commutation money: *hurchill* v. *Denny* (1875), L. R. 20 Eq. 534.

Proceeds of sale of half-pay.

On the second marriage of B, a widow, she executed with the onsent of J, her intended husband, a deed settling certain ɔecified property. By an agreement dated the same day, reciting ıe settlement, and that the parties had agreed that any property hich B "may be entitled to," other than that included in the ettlement, "should be settled" upon similar trusts, B and J ovenanted "each with the other" that in case B "shall be ntitled" to any property other than that comprised in the settle-ıent, "the same shall be settled." *Held*, that the agreement pplied only to property to which B might afterwards become ntitled, and not to any property to which she was entitled at the ate of the agreement, but which was not included in the settle-ıent: *Re Blockley* (1884), 49 L. T. 805; 32 W. R. 385.

And where the wife was entitled in possession to a share of esidue, in respect of which she had, prior to the marriage, given release, but such release was subsequently to the marriage set side, and thereupon further sums were received by her in respect f her share it was held (reversing Kay, J.), that the additional esiduary property thus recovered could not be treated as having allen into possession when the release was set aside, and was onsequently not bound by a covenant to settle property acquired ubsequently to the marriage: *Re Garnett* (1886), 33 Ch. D. 300; 5 L. J. Ch. 773.

Husband's acquisition of interest in wife's property.

But if the husband acquires an interest on the marriage his cquisition is a sufficient future acquisition to fulfil the words of he covenant, where the covenant extends to property acquired y him, and binds him to settle it: *Williams* v. *Mercier* (1884), 0 App. Cas. 1; 54 L. J. Q. B. 148.

In *James* v. *Durant* (1839), 2 Beav. 177; 50 R. R. 149; *S. C.*

sub nom. James v. *James*, 9 L. J. Ch. 85, the words were: " I case the *wife* or any person or persons in trust for her or th *husband* in her right should at any time or times thereafter durin their joint lives, become possessed of, interested in, or entitled t any sum or sums of money or other personal property, estate effects whatsoever." It was held that personalty to which th wife was entitled in possession at the date of the marriage wa bound, on the ground (following the reasoning in *Grafftey* v *Humpage* (1838), 1 Beav. 46; 8 L. J. Ch. 98; 49 R. R. 284, 784 on appeal 3 Jur. 622) that by the marriage the husband acquire in his wife's right, title to the property in question. It appea from the report of *James* v. *James* in the Law Journal that th wife, for herself, etc., and the husband, for himself, etc., cov nanted that in case the wife " or the husband *in her right* shoul at any time or times *thereafter* during their joint lives become, etc. Lord Langdale, M.R., said that the words " at any tim or times *thereafter* " could only be construed to mean " at an time or times after the execution of the settlement "; and b virtue of the marriage and in right of his wife the husband acquire the title to the property in question. This case was followed i *Re Viant's Settlement Trusts* (1874), L. R. 18 Eq. 436; 43 L. J. Ch. 832, where Bacon, V.-C., decided that where the covenan was to settle property " to which the wife or the husband in h right should during the coverture become entitled " the words f futurity were satisfied by the interest that the husband acquire by the marriage; and in *Hamilton* v. *James* (1877), Ir. R. 11 E 223, which decided that a sum of money lent to the husband b the wife before the marriage was bound by a covenant to sett personalty to which the wife or the husband in her right shoul become entitled; and, although disapproved in other cases, wa re-established by the judgment of the House of Lords in *Willian* v. *Mercier* (1884), 10 App. Cas. 1; 54 L. J. Q. B. 148, where, the being an agreement and declaration in a marriage settlement th all real and personal property to which the wife or the husban in her right at any time during the coverture should becom entitled (except jewels which should belong to the wife for h separate use), should be settled, it was held, that personalty whic was vested in possession in the wife at the date of the marriag (1881), and consequently became the property of the husband b reason of the marriage, was included in the covenant, and therefo that jewels then belonging to the wife were within the exceptio and belonged to her for her separate use.

Cases *contra*.

Where the covenant was by the husband and wife, and th words were: " All such further or other portion or personal esta (if any) as shall during the life of the said (*wife*) become vest

or accrue to her, or as shall or may be assignable by the said *usband*) and (*wife*) or either of them in law or equity, either for vested or contingent interest" : *Hoare* v. *Hornby* (1843), 2 Y. C. C. C. 121; "if at any time or times during the said intended verture the said (*husband* and *wife*) or either of them in her ght, shall, by gift, descent, succession, or otherwise, become titled to any real or personal estate" : *Archer* v. *Kelly* (1860), Dr. & Sm. 300; 29 L. J. Ch. 911; 127 R. R. 115; followed in *Williams' Settlement*, [1911] 1 Ch. 441; 80 L. J. Ch. 249; "any rsonal estate should devolve to or vest in the wife or to or in e husband in her right" : *Churchill* v. *Shepherd* (1863), 33 av. 107; 140 R. R. 34; "all and singular the moneys, stocks, ods and chattels, and other personal estate which at any time times during the said intended marriage" the *wife* or the *sband* in her right "shall become possessed of, or entitled to, transmission, gift or otherwise, and whether in possession or pectancy" : *Re Browne's Will* (1868), 38 L. J. Ch. 316; L. R. Eq. 231 (at p. 232); "in case any personal property shall at y time or times during the said intended coverture be given or queathed to, or in any manner vest in" the *wife* or the *husband* her right : *ibid.*, at p. 233; it was held that property to which e wife was at the date of the settlement entitled in possession as not bound; but it is doubtful how far these cases can stand ter the decision in *Williams* v. *Mercier* (*supra*).

Vested reversion, not falling into possession during coverture is not bound.

Property to which the wife is entitled in remainder or reversion at the date of the marriage, but which does not fall into possession until after the determination of the coverture, is not bound by the covenant where the subject-matter of the covenant is described by words applicable to future acquisition by the wife only; but it may be doubted whether the acquisition of it, if personalty, by the husband on the marriage is not a sufficient future acquisition of it by him, if the covenant extends to property acquired by him.

The rule was applied to a post-nuptial settlement in *Wyndham's usts* (1865), L. R. 1 Eq. 290, where the husband covenanted at "all real and personal estate and effects which shall or may any time *hereafter during the joint lives* of the husband and fe *descend*, devolve upon, or be given, devised, or bequeathed , or in trust for her," should be for her separate use : Wood, -C., distinguishing *Grafftey* v. *Humpage* (1838), 1 Beav. 46; appeal, 3 Jur. 622.

In *Re Pedder's Settlement Trusts* (1870), L. R. 10 Eq. 58 James, V.-C., applied the rule to a vested remainder in real estat which did not fall into possession till after the termination of t coverture. He says: "The words of the covenant are words futurity: 'shall during the coverture become seised or possess of or entitled to'; and I find nothing to warrant a departure fro the literal and natural meaning of the words. This is not pr perty with regard to which it can be averred that the husband wife did become 'seised or possessed of or entitled to' it 'duri the coverture.' No seisin, no title accrued to either of them respect of it during the coverture; hence the property does n satisfy the words of futurity in the covenant, and consequent was not included within it." *Re Clinton's Trust* (1872), L. 13 Eq. 295, *per* Wickens, V.-C., is to the same effect.

Whether husband's acquisition of interest is sufficient.

Where the reversionary interest is personalty, the change interest caused by the marriage, which gives an inchoate intere in the property to the husband, is sufficient to satisfy the wor "becoming entitled, etc."; and accordingly property of th description is bound, whether it fell into possession after the dea of the wife only: *Grafftey* v. *Humpage* (*supra*, p. 657); *Re Viant Settlement Trusts* (1874), L. R. 18 Eq. 436; or after the deat of both husband and wife: *Re Hughes' Trust* (1863), 4 Giff. 43 141 R. R. 266.

These cases were disapproved by Jessel, M.R., in *Re Jone Will* (1876), 2 Ch. D. 362; 45 L. J. Ch. 428, where the wife w at the date of the marriage entitled to a reversionary interest personalty which did not fall into possession till after her deat and it was held it was not bound by the covenant. "The cov nant provides that any property shall be settled to which the wif or her husband in her right, should at any time or times duri the coverture become beneficially entitled in possession or reve sion, or in any manner whatever, derivable directly or indirect from a particular source. Inasmuch as the tenant for life outliv the wife, it is clear that *she* did not, nor did her husband in h right, during the coverture become entitled in possession to a fu which was hers in reversion before the marriage took place. is equally clear that the husband, during the coverture, did n become entitled in right of his wife. His title accrued, not duri the coverture, but afterwards, when he took out administrati to his wife's estate. The sort of inchoate title that he had duri the coverture, depending on the possibility of the property falli into possession during the coverture, really amounts to no ti at all. Property such as this is not property to which the husba or the wife 'became entitled during the coverture'": *per* Jess M.R., *Re Jones' Will* (*supra*).

But since the case of *Re Jones' Will*, the decision in *Williams* . *Mercier* (1884), 10 App. Cas. 1 (*supra*, pp. 655, 656), has to be onsidered.

Specific property.

By an ante-nuptial agreement, not under seal, signed by the tending husband and wife and the parents of the wife, the arents agreed to appoint a share of certain real estate, which was ubject to their life interests, and to the appointment of them and ne survivor of them, to the wife; and the husband agreed that he will settle such share as the wife may take in her father and nother's marriage settlement either by appointment or in default f appointment." The wife's father, having survived her mother, eleased the power and granted the estate after his death, giving ne wife a share. The wife predeceased the husband and left two nildren. The property being still reversionary, an action was rought by the husband and one of the children against the other nild, the wife's heir-at-law, for specific performance of the agreeent. *Held*, that the property in question was bound, as being pecifically described, and because the wife, having been a party o the agreement, thereby assented to the property being settled n a particular way: *Lee* v. *Lee* (1876), 4 Ch. D. 175; 46 L. J. h. 81.

Vested reversion falling into possession during coverture is bound.

Property to which the wife is entitled in remainder or reversion at the date of the marriage, and which falls into possession during the coverture, is bound by the covenant, where the subject-matter of the covenant is described by words applicable to future acquisition only.

The rule was applied where the words were: "All the property f what nature or kind soever to which the *wife* shall during the overture become entitled": *Blythe* v. *Granville* (1842), 13 Sim. 90; 12 L. J. Ch. 82; 60 R. R. 319; "in case, at any time or mes hereafter during the coverture, any real or personal property nd effects, of what nature or kind soever, shall descend, come to, r vest in, the *wife* or the *husband* in her right at law or in quity": *Ex p. Blake* (1853), 16 Beav. 463; 96 R. R. 216; "all ich real and personal estate as, at any time during the said tended coverture, the *wife* or the *husband* in her right shall ecome entitled to, by descent, transmission, claim, devise, bequest, ft, donation, representation, purchase, or otherwise": *Bradford* . *Romney* (1862), 30 Beav. 431; 132 R. R. 342; "if at any time uring the life of the *wife*, any real or personal estate should be ven or devised, descend, or devolve, be bequeathed, or come to er or to the *husband* in her right": *Spring* v. *Pride* (1864), 4 e G. J. & S. 395; 140 R. R. 841; "if at any time or times after

the solemnization of the said intended marriage, and during tl joint lives of the *husband* and *wife*, they or either of them in h right shall by gift, descent, succession, or otherwise howsoeve become entitled to any real or personal estate, property, effects" : *Re Clinton's Trust* (1872), L. R. 13 Eq. 295. *Re Bland Settlement*, [1905] 1 Ch. 4; 74 L. J. Ch. 28; followed in *Re Capel Trusts*, [1914] W. N. 378, is *contra*, but in that case there w a proviso that reversionary interests which became subject to tl covenant were not to be sold without the consent of the husbar and wife, and Kekewich, J., held that, since those words point to reversionary interests to which the title in reversion first accru during the marriage being subject to the covenant and the cov nant therefore applying to acquisition of interest, it could not al apply to acquisition of possession, following the *dictum* Wickens, V.-C., in *Re Clinton's Trust* (*supra*), at p. 305; but *Re Crook's Settlement*, [1923] 2 Ch. 339; 92 L. J. Ch. 495, whe the agreement was to settle the "future acquired" property the wife, it was provided that if the wife at any time during tl intended coverture or the husband in her right should become b any means, except purchase for valuable consideration, seise possessed, or entitled of or to any real or personal property or ar estate or interest whatsoever in possession, reversion, remainde or expectancy (with certain immaterial exceptions), and there w a proviso restraining the sale of any reversionary property un it fell into possession, unless it should appear to the trustees th an earlier sale would be beneficial, it was *Held* that property which the wife was entitled in reversion at the date of the marria and which fell into possession during the coverture was caught b the covenant. *Held*, further, that if the property was not bou by the wife's covenant then the property on falling into possessi belonged to the husband in right of his wife, and he became bou to settle the same. *Re Clinton's Trust* (*supra*) and *Re Willia* (*supra*, p. 657), preferred to *Re Bland* (*supra*).

Contingent interest vesting in possession during coverture is bound.

Property in which the wife has a continge interest at the date of the marriage, and which fa into possession during the coverture, is bound b the covenant where the subject-matter of tl covenant is described by words applicable to futu acquisition only.

Where the wife is entitled to a contingent interest at the ti of the marriage, one of three events may happen—

(i) The property may vest both in interest and possessi during the coverture.

(ii) The property may vest in interest but not in possession during the coverture; or

(iii) The property may not vest in interest or in possession during the coverture.

In the first case, the property, when described by words of future acquisition, will be bound, and in the second and third cases it will not be bound, by the covenant.

Case i. Vesting in interest and possession.

Accordingly, where the wife was at the date of the marriage entitled to a contingent interest in real estate: *Archer* v. *Kelly* (1860), 1 Dr. & Sm. 300; followed in *Re Williams' Settlement*, [1911] 1 Ch. 441; 80 L. J. Ch. 249; or in real and personal estate: *Brooks* v. *Keith* (1861), 1 Dr. & Sm. 462; or in personalty: *Re Worsley's Trusts* (1867), 16 L. T. 826; the property, having fallen into possession during the coverture, was held to be bound by the covenant.

By a deed of assignment executed in contemplation of her marriage the plaintiff assigned to trustees (*inter alia*) all her one-third share in certain mortgage debts which formed part of the trust funds of her mother's marriage settlement, and to which she was absolutely entitled in possession, "and all other, if any, her share and interest" in the said mortgage debts. The trusts of this deed were to raise out of the assigned property a sum of £12,000 to be held upon the trusts of a deed of even date and subject thereto to stand possessed of the assigned property for herself absolutely. The second deed, being the plaintiff's marriage settlement, declared the trusts of the £12,000, and contained a covenant by the plaintiff with the trustees that if she should at any time during the intended coverture "become entitled in any manner and for any estate or interest to any real or personal property exceeding in value £500 at one time and from one and the same source" (with certain immaterial exceptions), she would convey the same to the trustees upon trust for sale and conversion (with the proviso that a reversionary interest was not without special reason to be sold before it fell into possession), and the proceeds of such sale and conversion were to be held by the trustees so as to form one fund for all purposes with the plaintiff's trust fund thereinbefore settled. At the date of these two deeds the plaintiff was contingently entitled to a further one-third share in the mortgage debts and certain stocks in the event, which happened shortly after her marriage, of one of her younger brothers dying before attaining twenty-one. *Held* (1) that the contingent interest in the share of the brother passed by the deed of assignment, and that, subject to raising the £12,000, the moneys representing such share were payable to the plaintiff without being caught by the covenant, which must be read in the light of the trusts of the

deed of assignment in such a way as not to defeat those trusts (2) that the share of the plaintiff in the trust funds of her parents marriage settlement (other than the mortgage debts) which fe into possession on the brother's death, was caught by the covenant *Re Williams' Settlement*, [1911] 1 Ch. 441; 80 L. J. Ch. 249.

Case ii. Vesting in interest only.

The only case on the second head is *Re Michell's Trusts* (1878) 48 L. J. Ch. 50; 9 Ch. D. 5, where it is said by Jessel, M.R. (a p. 10), "The husband was not able to settle it during the cover ture. He could not dispose of it by any means, nor could he an his wife together do so; it was not disposable; it was not propert which could be effectually settled." It should be observed tha the instrument under which the wife took the reversionary interes was dated in 1825, so that the interest was not alienable by th married woman under Malins' Act (20 & 21 Vict. (1857) c. 57) and, if the only reasons for the decision were those given by th Master of the Rolls, a different decision might be given in a cas falling under Malins' Act, or the Married Women's Property Act 1882. But Cotton, L.J., gives another reason, saying that th object of the covenant is to prevent the husband taking the pro perty absolutely, and to bind it for the benefit of the wife an children; and probably in cases falling under Malins' Act it woul be held that, though the wife would not be bound to convey th property, while it was reversionary, to the trustees of the settle ment, she would not be allowed to convey the property, while i was reversionary, to anyone else, in such a manner as to preven the property from being transferred to the trustees on its fallin into possession during the coverture.

Case iii. Not vesting in interest.

Where the contingent interest did not vest either in interest o in possession during the coverture, it was held not to be bound *Atcherley* v. *Du Moulin* (1855), 110 R. R. 165; 2 K. & J. 186 where Wood, V.-C., said at p. 193: "The word 'entitled' migh be large enough to include a contingent interest, if the other word of the settlement showed that it was intended to have that effect but when I find the words are that whatever she should 'be o become entitled to during her coverture' is to be vested in th trustees . . . it is impossible to say that such a provision comprise anything more or other than what should so become her propert as to admit of being dealt with upon the trusts of the settlemen It is very questionable whether such a covenant would comprehen even a reversionary interest. Certainly this contingent possibilit is not within the words or spirit of the settlement."

Property acquired in possession during coverture to which

Property to which the covenantor has no titl of any kind at the date of the marriage, but whic is acquired in possession during coverture, is boun

by the covenant where the subject-matter of the covenant is described by words applicable to future acquisition only: *per* Wickens, V.-C., *Re Clinton's Trust* (1872), L. R. 13 Eq. 295, at p. 305; but property acquired on a mere change of investment is not within the covenant, nor are accumulations of income.

the wife had no title at date of marriage is bound.

Change of investment.

"If a man has something to sell, and he sells it and gets the purchase-money, he does not acquire a future title, for it is his title to the property which enables him to get the money for it or to vary the investment, and varying an investment is not acquiring a title": *per* Jessel, M.R., *Churchill* v. *Denny* (1875), L. R. 20 Eq. 534, at p. 536. Thus the commutation money paid to an officer in the navy in respect of his half-pay is not property to which he becomes entitled on the commutation, being only the purchase-money of the half-pay which he already owns: *Churchill* v. *Denny* (*supra*).

Where property which is expressly excepted from the settlement is sold and invested in other property, such property does not fall within the covenant: *Finlay* v. *Darling*, at p. 723; *Re Dowding's Settlement*, at p. 446; *Re Clutterbuck's Settlement*, at p. 204; overruling *Re Bendy*, for which cases see p. 649, *supra*.

Accumulations of income are not bound, see *supra*, p. 649.

Accumulations of income.

Covenant to settle "any real or personal estate and effects" on trusts for sale and investment. *Held*, that no exception could be implied of any specific chattels: *Willoughby* v. *Middleton* (1862), 2 J. & H. 344; nor property given by husband to wife: *Re Ellis's Settlement*, [1909] 1 Ch. 618; 78 L. J. Ch. 375; distinguishing *Coles* v. *Coles* (*infra*). See also *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609; 79 L. J. Ch. 340. And as to a bonus received by the wife on a sale under the Irish Land Acts, see *Tremayne* v. *Rashleigh*, [1908] 1 Ch. 681; 77 L. J. Ch. 365.

Specific chattels.

Gifts from husband to wife.

But in *Coles* v. *Coles*, [1901] 1 Ch. 711; 70 L. J. Ch. 324, where the wife had assigned to the trustees all her property, present and expectant or future, Joyce, J., held that she was not bound to settle a sum of £280 given her long afterwards by her husband. This was a settlement of doubtful construction.

A covenant by the husband in a post-nuptial settlement to settle after-acquired property excepted furniture, plate, jewels and other chattels of domestic or household use. The covenantor became entitled as one of the next-of-kin to a share of the estate of his brother who had died intestate, and whose estate comprised pictures of considerable value. *Held*, that at no time was the covenantor entitled specifically to any part of the intestate's estate

answering to the description of the property excepted from th covenant, and that the whole of his interest in his brother's estat was bound by the covenant: *Vanneck* v. *Benham*, [1917] 1 Ch 60; 86 L. J. Ch. 7.

Joint tenancy.

It has been held that property given to the husband and wif as joint tenants in fee was not within a covenant by the husban and wife to settle property which they or either of them in he right should become entitled to, but this was helped by a recital *Edye* v. *Addison* (1863), 1 H. & M. 781; 12 W. R. 97; 33 L. J Ch. 132; 136 R. R. 349.

Estate tail.

In *Hilbers* v. *Parkinson* (1883), 25 Ch. D. 200; 53 L. J. Ch 194, it was held by Pearson, J., that the wife was not bound t assign an estate tail in possession in real estate to which sh became entitled during the coverture; followed and approved i *Re Dunsany's Settlement*, [1906] 1 Ch. 578; 75 L. J. Ch. 356 And see *Re E. D. S.*, [1914] 1 Ch. 618, at p. 625; 83 L. J. Ch. 505

Covenant inoperative.

What as land cannot be settled by the *lex loci* is not bound *Re Pearse's Settlement*, [1909] 1 Ch. 304; 78 L. J. Ch. 73; follow ing *Re Dunsany* (*supra*).

Reversionary interest acquired during coverture is bound.

Property to which the wife has no title at th date of the marriage, and which she acquires i remainder or reversion during the coverture, eve if it does not fall into possession till after th termination of the coverture, is bound by the cove nant where the subject-matter of the covenant i described by words applicable to future acquisitio only.

Covenant by the husband only, to settle "all the estate, pro perty and effects to which the *wife* or the *husband* in her righ shall at any time or times during the intended coverture becom seised or possessed of or entitled to, either at law or in equit under any gift, devise, or bequest in her favour by or on the pa of her father." *Held* to bind a remainder given to the wife b her father's will: *Hughes* v. *Young* (1862), 32 L. J. Ch. 137; N. R. 166; 9 Jur. (N.S.) 376; 139 R. R. 310.

Agreement and declaration and covenant by the husband onl that "in case any personal estate, effects and property shall a any time or times hereafter during the intended coverture com to or vest in the *wife* or in the *husband* in her right," such propert should be settled. *Held*, to bind a remainder: *Butcher* v. *Butch* (1851), 14 Beav. 222.

In *Townshend* v. *Harrowby* (1858), 4 Jur. (N.S.) 353; 27 L. J Ch. 553; 6 W. R. 413, it was held on the words of the settlemen

at the remainder would or would not be bound according as e husband or wife survived : *Dickinson* v. *Dillwyn* (1869), L. R. Eq. 546; *Cowper Smith* v. *Anstey*, [1877] W. N., p. 28.

Defeasible reversion.

A reversionary interest liable to be divested by a power of pointment is bound by the covenant : *Re Ware* (1890), 45 Ch. 269; 59 L. J. Ch. 717.

Contingent interest acquired during coverture.

There is no decision as to the effect of a covenant describing e property by words of future acquisition only on property a ntingent interest in which first accrues to the wife during the verture; it appears to satisfy the words "shall become titled" : *Re Mackenzie's Settlement* (1867), L. R. 2 Ch. 345; *ar* v. *George* (1876), 2 Ch. D. 706; *Cornmell* v. *Keith* (1876), Ch. D. 767; though possibly the reasoning in *Re Michell's Trusts* 878), 9 Ch. D. 5 (*supra*, p. 662), might be followed.

"In *Re Michell's Trusts* the covenant was a covenant by the sband only, and not by the wife, and that alone, I think, having gard to the other cases, might have been sufficient to prevent e covenant operating in the events which had actually happened. it further than that, it was a covenant to settle any property ich might come to or devolve upon the wife, and at the time the marriage the wife was entitled to a contingent reversionary terest. The contingency happened, and the interest became sted during the coverture, but the reversion did not fall in till ter the coverture, and it was held that the property vesting in terest after the marriage, but not in possession during the coverre, was not bound" : *per* Parker, J., *Lloyd* v. *Prichard*, [1908] Ch. 265, at p. 277; 77 L. J. Ch. 183.

Named minimum value, refers to value of property, not of reversion.

Where only property of a named minimum value is to be settled, and the wife's interest is reversionary, the sum named means the value of the property itself when it falls into possession, not the value of the reversion when acquired.

This is decided in *Re Mackenzie's Settlement* (1867), L. R. 2 . 345; *Re Clinton's Trust* (1871), L. R. 13 Eq. 295 (where ickens, V.-C., says (at p. 306) : "The property to be acquired to be 'of the value' of £100 or upwards. That seems to me mean the actual value, and not the estimated value of a mainder acquired during coverture, and not falling into possesn till many years afterwards"); and *Cornmell* v. *Keith* (*supra*), p. 771.

Amount left in blank.

Where the amount is left in blank, there is not such uncertainty to render the covenant void, Lord Cranworth, C., being of inion that the covenant extended to all capital, but not to income

to which the settlor should become entitled: *Fyfe* v. *Arbuthn* (1857), 1 De G. & J. 406; 26 L. J. Ch. 646.

Duties are to be deducted.

Where the amount received by the wife is subject to lega duties, the value is what the wife receives, not what the testat gives, the duty being deducted before arriving at the value: *Pares*, [1901] 1 Ch. 708; 70 L. J. Ch. 426; but where the co nantor had received before and since the marriage sums by w of advancement, it was held by Malins, V.-C., that though t balance receivable was less than the stipulated amount, it w bound by the covenant: *Hood* v. *Franklin* (1873), L. R. 16 E 496.

"At any one time."

Where the wife was entitled at the date of the settlement two different reversions which fell into possession at the sa instant, it was held that, in estimating the value for the purpo of the covenant, the aggregate value of the two shares, and n the value of each share separately, must be taken: *Re Mackenzi Settlement* (1867), L. R. 2 Ch. 345. But in *Hood* v. *Frank* (1873), L. R. 16 Eq. 496, it was held (following *Re Hooper's Tr* (1865), 13 W. R. 710; 11 Jur. (N.S.) 479; 147 R. R. 827) that t words "at any one time," implied "from one and the sa source." In neither of these cases had the wife any interest either fund at the date of the settlement.

By an ante-nuptial settlement an intended wife covenanted settle "all real and personal property (if any) not hereinbef settled" to which she "at the time of the said intended marria or at any time during her now intended coverture shall be become entitled whether in possession, reversion, or otherw (except moneys, chattels and effects . . . and except also a legacy or other property acquired at one and the same time n exceeding in amount or value the sum of £200)." At the da of the marriage the wife was contingently entitled to one-eigh of certain funds comprised in her parents' marriage settlement, a also to one-eighth of certain other funds devisable by the will her grandfather. When these interests respectively fell into poss sion her share in her parents' settlement funds was of the appro mate value of £150, and her share under her grandfather's will the approximate value of £190. At the date of the wife's marria settlement her share in her parents' settlement funds was less th £200, but the value of her share under her grandfather's will w more than £200. *Held* (*inter alia*), for the purpose of ascertaini the value of reversionary interests acquired at one and the sa time and from different sources, that the date when the intere fell into possession was the proper time for determining their va and that the value of the respective interests ought not to aggregated: *Re Hughes' Settlement*, [1924] 2 Ch. 356.

Where the wife was entitled under a will to an immediate acy, and also to another legacy to be paid out of the proceeds certain real estate, it was held that she was entitled to them th "at one and the same time and from one and the same irce": *Re Pares* (*supra*, p. 666); and see *Sinclair* v. *Fell*, [1913] Ch. 155, at p. 163; 82 L. J. Ch. 105; but *Re Middleton's Will* 368), 16 W. R. 1107, and *Re Davies*, [1897] 2 Ch. 204; 66 L. J. . 512 (a case on section 7 of the Married Women's Property Act, 70), are *contra*.

Successive appointments of several sums.

Where the wife took under several appointments made by herf on the same day in exercise of the same power, and the amount pointed by each deed was less than, though the aggregate sum ceeded, the minimum, it was held that the property was not und: *Bower* v. *Smith* (1871), L. R. 11 Eq. 279 (this report is correct; *per* Jessel, M.R., in *Steward* v. *Poppleton*, [1877] W. N. ; 19 W. R. 399); *Re Gerard* (1888), 58 L. T. 800.

Increase of value after coverture determined.

Covenant for settlement of wife's after-acquired property of the nimum value of £500. Prior to the date of the settlement, a quest had been made to trustees of an annuity, to be applied olly or partly for the testator's widow, the surplus to be acculated and divided at her death among the testator's children, e of whom was the intended wife. The husband died before the ne of distribution; and when that time arrived the wife's share ounted to over £500, but it had never amounted to that sum ring the coverture. *Held*, that it was not bound: *Re Welstead* 882), 47 L. T. 331.

Effect of Married Women's Property Act, 1882.

The Married Women's Property Act, 1882, has practically no ect on the construction of covenants to settle property of the fe, because by section 19 it is provided that "nothing in this t contained shall interfere with or affect any settlement, or reement for a settlement, made, or to be made, whether before after marriage, respecting the property of any married woman." For instance, where a woman married before the Act covented to settle her after-acquired property, other than property ited to her separate use, it was held that property bequeathed her absolutely by a will which came into operation after 1882 hich was consequently her separate property under section 5 the Act) was not excepted from the covenant: *Re Stonor's Trusts* 883), 24 Ch. D. 195; 52 L. J. Ch. 776; *Re Whitaker* (1887), 34 . D. 227; 56 L. J. Ch. 251; and where the covenant was by husband alone, property which was left to the wife was held und, as but for the Act it would have belonged to the husband: *ncock* v. *Hancock* (1888), 38 Ch. D. 78; 57 L. J. Ch. 396; and an infant wife's property was held bound, by her husband's ignment of personalty to which she was entitled in possession:

Stevens v. *Trevor-Garrick*, [1893] 2 Ch. 307; 62 L. J. Ch. 66
and by a mere recital of an agreement in a deed to which t
husband was a party: *Buckland* v. *Buckland*, [1900] 2 Ch. 58
69 L. J. Ch. 648.

But by section 2, sub-section 1, of the Married Women's P
perty Act, 1907, settlements or agreements for a settlement ma
after the commencement of that Act by the husband or intend
husband, whether before or after marriage, with regard to t
property of his wife or prospective wife are invalid unless execut
by the woman if of full age or confirmed by her after attaini
that age.

By sub-section 2 it is provided that if the woman dies an infa
any covenant or disposition by her husband shall bind or pass a
interest in any of her property to which he may become entit
on her death and which, apart from the Act, he could have bou
or disposed of.

The decisions on the above cases in so far as they depend up
the construction of section 19 of the 1882 Act have, therefore, be
reversed to the extent of their conflict with section 2 of the 19
Act.

Property given with direction that it is not to be bound by covenant.

Where a covenant has been entered into for t
settlement of the after-acquired property of
married woman, and a gift is afterwards made
her of such a nature as to come within the wor
of the covenant, no expression of the intention
the donor that it is not to be settled will exclude
from the operation of the covenant.

In *Re Mainwaring's Settlement* (1866), L. R. 2 Eq. 487,
p. 495, Wood, V.-C., seems to have considered that the intenti
of the donor could govern the construction of the covenant; b
the judgment was not founded on this opinion, which is erroneo
and has been disapproved by Chitty, J., in *Re Allnutt* (1882),
Ch. D. 275; and by Cotton, Bowen, and Fry, L.JJ., in *Scholfield*
Spooner (1884), 53 L. J. Ch. 777; 26 Ch. D. 94, where Bowen, L.
says (at p. 101): "Whether property falls within a covenant to set
after-acquired property or not, must turn, as it seems to me, up
the construction of the covenant. There has been laid down a can
with reference to the construction of such covenants, that wh
you find the property does not fit the trusts of the settlement, th
you may assume as a consequence that it was not intended
come within the covenant at all. That seems to be good sen
But that rule itself is only, to my mind, a rule of constructio
and the question must be whether, on the true construction of t

venant, the particular property falls within it or not. If that is e right view, it cannot be material to consider the intention with ich after-acquired property has been given. A gift is not the s a gift because the donor intends that it shall not follow the rgain which the party to whom it was given has made as to its volution. You may look at the way in which it is given to see it is a gift coming within the terms of the covenant to settle, t no declarations of intention as to what are to be the conseences can have any effect": and Fry, L.J., *ibid.* (at p. 102), ys: "The question is one of considerable moment, *viz.*, whether e intention of the donor can operate to take a gift out of the eration of the covenant, when, but for such expression of intenn, the gift would have fallen within its operation. . . . Now, principle, it appears to me to be impossible that that question n be answered in the affirmative. It seems to me that we must quire, first, what is the construction of the covenant to settle; xt, what is the gift; and that, if the gift comes within the scope the covenant, then no expression of intention on the part of e donor can take it out of the operation of the covenant. In nstruing the gift we must consider what is the subject-matter the gift, and what are the limitations subject to which it is ade; and if it is found that those limitations are inconsistent th the limitations of the covenant to settle, then the Court may ell conclude that the subject-matter of the gift does not come thin the scope of the covenant. The intention of the donor of e gift cannot, in my judgment, be regarded, except so far as bears on the nature of the gift he has made."

Gift for purpose inconsistent with covenant.

But where the covenant excepted property expressly exempted om its operation either by the instrument under which it was quired or by the donor in writing, a legacy to the wife to enable r to purchase a memento of the testator (*e.g.*, a pearl necklace), as held not to be subject to the covenant on the ground that e purpose of the gift was clearly inconsistent with its application nder the covenant, and although the testator was unaware of e covenant: *Re Thorne*, [1917] 1 Ch. 360; 86 L. J. Ch. 261.

Restraint on anticipation.

Of course, if the married woman is effectually restrained from ienation the property cannot be settled: *Re Currey* (1886), 32 h. D. 361; 55 L. J. Ch. 906; but if the restraint on anticipation plies only while the property is reversionary, the property must settled when it falls into possession: *Re Bankes*, [1902] 2 Ch. 3; 71 L. J. Ch. 708.

Where a settlor covenanted to settle his interest in (*inter alia*) y property of which he should become entitled by purchase and fected a policy subject to a condition that "it should not be signable in any case whatever," it was held that such condition

merely made the policy non-assignable at law (as it would ha been prior to the Policies of Assurance Act, 1867 (30 & 31 Vi c. 144)), and did not prevent his assigning his beneficial inter therein, which he was consequently bound to do: *Re Turc* (1888), 40 Ch. D. 5; but what as land cannot be settled by t *lex loci* cannot be bound: *Re Pearse's Settlement*, [1909] 1 C 304; 78 L. J. Ch. 73.

Divesting on alienation.

But where holding the property to be subject to the covena would destroy the property, the property is not bound by t covenant: see *per* Chitty, J., *Re Allnutt* (1882), 22 Ch. D. 2 (at p. 280); 52 L. J. Ch. 299. Thus a life interest subject forfeiture on alienation was held not to be within a covenan *Re Crawshay*, [1891] 3 Ch. 176; 60 L. J. Ch. 583; *Re Smit* [1928] 1 Ch. 10; even if life interests not so subject would ha been within the covenant, as to which no decision was given, b see *supra*, p. 648.

Covenant severs joint tenancy.

A covenant to settle property operates as severance of a joint tenancy in such property.

The rule applies to cases in which the wife has an interest the property at the date of the settlement: *Brown* v. *Rain* (1796), 3 Ves. 256; *Caldwell* v. *Fellowes* (1870), L. R. 9 Eq. 41 *Baillie* v. *Treharne* (1881), 17 Ch. D. 388; and to cases in whi she has no interest at such date: *Re Hewett*, [1894] 1 Ch. 36 63 L. J. Ch. 182.

Covenant by infant is voidable not void.

A covenant by an infant to settle property voidable and not void.

Election.

The infant may on attaining twenty-one elect to avoid or affi such a covenant; and if the covenantor be at the time of affir ing it a married woman her affirmance binds all property to whi she is then entitled, whether in possession or reversion or or contingently, but no other property: *Milner* v. *Lord Harewo* (1810), 18 Ves. 259; *Pimm* v. *Insall* (1848), 7 Hare, 193; 19 L. Ch. 1; 84 R. R. 122; *Ex p. Blake* (1853), 16 Beav. 463; *Smi* v. *Lucas* (1881), 18 Ch. D. 531; *Wilder* v. *Pigott* (1882), 22 C D. 263; 52 L. J. Ch. 141; *Re Hodson*, [1894] 2 Ch. 421; 63 L. Ch. 609. If the property be realty an acknowledged deed is n necessary: *Barrow* v. *Barrow* (1858), 4 K. & J. 409; 27 L. J. C 678; 116 R. R. 377. Notwithstanding certain earlier cases married woman who elects to avoid the covenant does not lo her interests which she is restrained from alienating in other pr perty subject to the settlement: *Re Vardon's Trusts* (1885), Ch. D. 275; 55 L. J. Ch. 259, explained in *Re Hargrove*, [191 1 Ch. 398; 84 L. J. Ch. 484.

But the repudiation of the settlement containing the covenant ıst be made within a reasonable time, and where an infant cove-ıts in her marriage settlement to settle certain reversionary erests under trusts entirely in favour of herself and her children, e cannot, eighteen years after attaining her majority, repudiate e settlement, although the settled interests are still reversionary: *rnell* v. *Harrison*, [1916] 1 Ch. 328; 85 L. J. Ch. 321; dis-proving *Re Jones*, [1893] 2 Ch. 461; 62 L. J. Ch. 996; and plying *Carter* v. *Silber*, [1893] A. C. 360; and the infant cannot ad ignorance of her right to repudiate as an answer to her ligation to exercise that right within a reasonable time: *Carnell Harrison, supra.*

Covenant of infant to settle after-acquired property by virtue of Infants' Settlement Act, 1855.

An infant has power under the Infants' Settlement Act, 1855, covenant to settle after-acquired property, and an interest quired by the infant settlor under the will of a person dying bsequent to the settlement is caught by such a covenant, such erest being property "in expectancy" within the meaning of tion 1 of the said Act: *Re Johnson*, [1891] 3 Ch. 48; 60 L. J. . 499.

Effect of Married Women's Property Act, 1882.

It must be remembered that, inasmuch as section 19 of the ırried Women's Property Act, 1882, practically enacts that tlements are to be read as if that Act had not been passed, an ant wife's property (not settled expressly to her separate use) often caught by an assignment by, or a covenant of, her husband, ıich she of course cannot avoid: *Stevens* v. *Trevor-Garrick*, 893] 2 Ch. 307; *Buckland* v. *Buckland*, [1900] 2 Ch. 534. e, however, the provisions of section 2 of the Married Women's operty Act, 1907, p. 668, *supra*, as to settlements or agreements settlements made after 1907.

Covenant not enforceable by volunteers.

A covenant for the settlement of property cannot be enforced by volunteers.

Where such a covenant is contained in a marriage settlement ly persons within the marriage consideration (that is, the hus-nd and wife and issue of the marriage) can enforce it. The incipal authorities for this rule are: *Colyear* v. *Mulgrave* (1836), Keen, 81; 5 L. J. Ch. 335; 44 R. R. 191; *Pullan* v. *Koe*, [1913] Ch. 9; 82 L. J. Ch. 37; *Re D'Angibau* (1880), 15 Ch. D. 228 llowed in *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609; L. J. Ch. 340; and in *Re Pryce*, [1917] 1 Ch. 234; 86 L. J. . 383); *Green* v. *Paterson* (1886), 32 Ch. D. 95, at pp. 105—6; L. J. Ch. 181 (where the settlement being post-nuptial, children the marriage were held to be mere volunteers); *Att.-Gen.* v. *cobs Smith*, [1895] 2 Q. B. 341; 64 L. J. Q. B. 605 (where all cases are discussed). *Quaere* whether *Gale* v. *Gale*, 6 Ch. D.

144; 46 L. J. Ch. 809, which is *contra*, can be supported: see p
Lindley, L.J., *Att.-Gen.* v. *Jacobs Smith* (*supra*, p. 671), at p. 34

Covenant to leave by will.

A covenant to leave property or a share of property by w
does not prevent *bona fide* dispositions of property during li
time: *Fortescue* v. *Hennah* (1812), 19 Ves. 67; 12 R. R. 13
Jones v. *Martin* (1792), 3 Anst. 882; in D. P. (1798), 5 V
266, n.; 5 R. R. 32; *Cochran* v. *Graham* (1811), 19 Ves. 63,
p. 66; *Needham* v. *Smith* (1828), 4 Russ. 318; 6 L. J. (o.s.) C
107; 28 R. R. 107; but it appears that advancements made
other children since the date of the covenant must be broug
into account: *Willis* v. *Black* (1828), 4 Russ. 170; reversing (182
1 Sim. & Stu. 525.

Creates a specialty,

Such a covenant creates a specialty: *Graham* v. *Wickh*
(1863), 1 De G. J. & S. 474; 135 R. R. 521; and a volunta
covenant that one's executors shall pay over one's whole prope
is good: *Patch* v. *Shore* (1862), 2 Dr. & Sm. 589; 32 L. J. C
185; 143 R. R. 283.

Covenant by a father, in a marriage settlement, by will
otherwise in his lifetime to give or assure one-fifth of his esta
subject to payment of a fifth of his debts, funeral and testamenta
expenses, and legacies, to trustees upon a protected trust for
son for life, and subject thereto for his wife and issue. *Held*, t
the trustees were entitled to a fifth of the testator's esta
notwithstanding a bequest of his estate to his children equall
McCarogher v. *Whieldon* (1867), L. R. 3 Eq. 236; 36 L. J. Ch. 1

Where performed covenantee is legatee.

But if the covenant is performed, the legatee is a mere lega
and not a creditor. "The covenant . . . was simply that he wo
bequeath by will or otherwise provide that this share of resi
should come to 'B.' He did bequeath it by will, and he theref
fulfilled his covenant. The effect of the bequest by the will
to make the lady a residuary legatee and nothing else": J
Jessel, M.R., *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq., at p.
43 L. J. Ch. 809.

Legacy may lapse.

Thus the bequest may be rendered nugatory by lapse. Wh
a father covenanted to leave a share upon trust for his daugh
for life, with remainder to her children with survivorship in
event of their dying under twenty-one, and he did so by his w
but all the children predeceased him. *Held*, that a child
attained twenty-one took nothing: *Re Brookman's Trust* (18
L. R. 5 Ch. 182; 39 L. J. Ch. 138.

A bequest, where there are no assets to provide for it, is
a performance: *Eyre* v. *Monro* (1857), 3 K. & J. 305; *Graham*
Wickham (*supra*).

Covenant may create a charge.

Such a covenant may create an actual charge on the co
nantor's property. Covenant in a marriage settlement to pay

nuity, and to charge it on a sufficient part of the realty of which venantor should die seised, but so that he should not be pre-nted from dealing with his realty during his life, or so only that fficient realty was left charged with the annuity by his will. evise of realty subject to the charges and incumbrances thereon. *eld*, that the settlement operated as a charge on the realty of hich the testator died seised: *Montague* v. *Earl of Sandwich* 886), 32 Ch. D. 525; 55 L. J. Ch. 925.

Effect of bankruptcy on covenant to assign.

Where a settlor assigned to trustees of his marriage settlement his interest, present, prospective or possible in certain trust nds comprised respectively in his parents' ante- and post-nuptial ttlements, and subsequently was adjudicated bankrupt, it was *eld* that nothing was protected from his trustee in bankruptcy cept property in which at the date of his marriage he had some ate or interest. He was at the date of his marriage entitled in mainder to (a) one-tenth share of trust funds under the afore-entioned instruments under a revocable appointment; and (b) to sum of £1,500 raisable (subject to a hotchpot provision) under similar but irrevocable power of appointment.

After his marriage and in the events which happened his first erest was revoked and a one-ninth share substituted therefor, d in course of time he became entitled to a further one-ninth are previously appointed to his brother's children. Both these e-ninth shares were subject to a power of revocation, but in t were never revoked.

Consequently, it was held on the above principle that the signment was void so far as it extended to the difference between e one-tenth and the first-appointed one-ninth share, and also to the secondly-appointed one-ninth share. An assignment of e above nature is a covenant or contract within the provisions the Bankruptcy Act, 1914: *Re Bulteel's Settlements*, [1917] Ch. 251; 86 L. J. Ch. 294.

CHAPTER XXXIV.

EXECUTORY TRUSTS AND MARRIAGE ARTICLES.

Executory Distinguished from Executed Trusts : Direction to Set as Counsel shall Advise : Technical Language Disregarde Remainder to Heirs, or Heirs of Body, or Issue Constru so as not to give Fee to Tenant for Life : Exceptio (i) Tenancy in Tail "ex provisione viri"; (ii) If Pa Strictly Settled : General Power of Appointment not give Whether Life Estate to be sans Waste : Remainder to He Construed as Strict Settlement : Rule against Perpetuitie Personalty Settled to go with Realty, not to Vest in Tena in Tail who Dies under twenty-one without Issue : Personalt Whether Life Estate to be without Power of Anticipatio Children Take as Tenants in Common : Power of Appoi ment among Children : Hotchpot Clause : Ultimate Trust Policies under Married Women's Property Acts : Iss meaning Children : Powers of Management to be Inserte Sale and Exchange : Varying Securities : Partition : Leasin Maintenance, Education, and Advancement : Appointing N Trustees : Powers of Charging not to be Inserted : Artic and Settlement Discrepant : If both ante-nuptial, Settleme Controls : If Articles only ante-nuptial, Articles Contro Specific Performance of Marriage Articles.

INASMUCH as "in construing the words creating an executo trust a Court of Equity exercises a large authority in subordinati the language to the intent" (*per* Lord Westbury, *Sackville-W v. Holmesdale* (1870), L. R. 4 H. L. 543, at p. 565; 39 L. J. C 505), it becomes necessary to consider what is an executory, distinguished from an executed, trust, and the distinction may expressed thus :

Executory distinguished from executed trust.

> A trust is called executory, where the stateme of the trusts is incomplete, and requires to further expressed by a subsequent instrument; a is called executed, where the statement of the trus is complete and final.

"Wherever the assistance of trustees, which is ultimately t assistance of this Court, is necessary to complete a limitation,

ıat case, the limitation of the will not being complete, that is ıfficient evidence of the testator's intention that the Court should odel the limitations. But where the trusts and limitations are ready expressly declared, the Court has no authority to interfere, ıd make them different from what they would be at law" : *per* r R. Henley, L.K., *Austen* v. *Taylor* (1759), 1 Ed. 361, at p. 368; mb. 376; cited *per* Plunket, C., *Herbert* v. *Blunden* (1837), 1 r. & Wal. 78, at p. 91; 56 R. R. 155.

"All trusts are in a sense executory, because a trust cannot e executed except by conveyance, and therefore there is always omething to be done. But . . . a Court of Equity considers an xecutory trust, as distinguished from a trust executing itself, and ıstinguishes the two in this manner: Has the testator been what called his own conveyancer? Has he left it to the Court to ıake out from general expressions what his intention is, or has e so defined that intention that you have nothing to do but to ıke the limitations he has given to you, and to convert them into gal estates?" *per* Lord St. Leonards, *Egerton* v. *Earl Brown-ow* (1853), 4 H. L. C. 1, at p. 210; 94 R. R. 1.

An executory instrument is one which "directs the execution f another instrument for the purpose of enabling the trust to be erformed": *per* Stuart, V.-C., *Osborn* v. *Bellman* (1860), 9 V. R. 11; 2 Giff. 593; 128 R. R. 221.

Executory trusts are contained in marriage articles, voluntary settlements, or wills.

It is often difficult to determine whether a trust is executed or xecutory. Executory trusts are usually contained in marriage rticles, voluntary settlements, or wills; but in the case of marriage rticles "the nature of the instrument establishes the fact" that he trust is executory. In the case of the other instruments that act "must be collected from the nature of the dispositions in the ıstruments": *per* Sugden, L.C. (Ir.), *Rochfort* v. *Fitzmaurice* 1842), 2 Dr. & War. 1, at p. 21; 59 R. R. 617.

"Voluntary settlements and wills generally stand on the same ooting. The settlement cannot stand on a footing inferior to ıat of a will: for the very act of making the settlement *inter vivos* ather leads to the inference that a strict settlement was intended; ı both, however, the rule of law is clear; the intention must be ollected from the four corners of the instrument, and the nature f the instrument does not enable the Court to say that a strict ettlement was intended. In marriage settlements the nature of ıe instrument leads to that conclusion; but in the case of a volun-ıry settlement, or even a settlement for valuable consideration ot upon marriage, there is nothing irrational in a limitation to a on of the settlor in tail; it may be improvident, but it is difficult say that it could not have been intended. I must suppose that ıose who use technical words intend to use them in a technical

sense, unless something to the contrary appears. In this cas then, I must look for the intention upon the face of the instrume itself. If I come to the conclusion that it is an executory trus there is no difference whatsoever between executory trusts, wheth created by marriage articles, by a voluntary settlement, or by will. There is, indeed, in the latter case, much greater difficul in arriving at the conclusion that the trust is executory; for, the first case, the nature of the instrument establishes the fac in the others, it must be collected from the nature of the dispo tions in the instruments. . . . I admit that, although this tru is so far executory as to leave something to be done, yet the par may afterwards have become, as it is styled, 'his own conve ancer,' that is, he may have defined so clearly his intention as the limitations of the settlement as to leave no room for ambigui or doubt; if he had done so, I must have given to the words has used their legal operation": *per* Sugden, L.C. (Ir.), *Rochfo* v. *Fitzmaurice* (*supra*), at p. 20; reported to the same effe 1 Con. & Law. 158 *et seq.*

Direction to settle as counsel shall advise.

A direction to settle "as counsel shall advise, affords a strong indication that the trusts are exec tory: *White* v. *Carter* (1766), 2 Ed. 366; affirm on rehearing (1768), 2 Amb. 670; but a me direction to convey does not of itself render a tru executory: *Franks* v. *Price* (1840), 3 Beav. 18 9 L. J. Ch. 383; 52 R. R. 97; *Doncaster* *Doncaster* (1856), 3 K. & J. 26, at p. 35; 1 R. R. 13.

"The words 'as counsel shall advise' must be read as quali ing the dispositions; you would not go to counsel and ask advice merely as to the proper form of conveyance to be us whether feoffment, bargain and sale, or lease and release, but y would also inquire how the limitations should be framed": Sugden, L.C. (Ir.), *Rochfort* v. *Fitzmaurice* (*supra*), at p. 21.

The question whether trusts contained in wills are or are executory is foreign to the scope of this treatise, and since as abo mentioned the only instruments, other than wills, in which exe tory trusts are commonly contained are marriage articles a voluntary settlements, the rules hereinafter stated are confined those instruments, but, inasmuch as "I know of no differe between an executory trust in marriage articles and in a will, exc that the object and purpose of the former furnish an indicati of intention": *per* Grant, M.R., *Blackburn* v. *Stables* (1814) V. & B. 367, at p. 369; 13 R. R. 120, and "there is no differe

hatsoever between executory trusts whether created by marriage rticles, by a voluntary settlement, or by a will" : *per* Sugden, L.C. [r.), *Rochfort* v. *Fitzmaurice* (1842), 2 Dr. & War. 1, at p. 20;) R. R. 617, certain of the cases on wills are cited as authorities.

In the case of executory trusts, the technical language of limitations may be disregarded if it appear on the face of the instrument directing the limitations that such technical language cannot be inserted in the limitations without defeating the intention of the parties.

Technical language may be disregarded.

[For the new law as affecting words of limitation, see hapter XVI.]

"In matters executory, as in case of articles or a will directing conveyance, where the words of the articles or will are improper r informal, this Court will not direct a conveyance according to uch improper or informal expressions in the articles or will, but ill order the conveyance or settlement to be made in a proper and egal manner so as may best answer the intent of the parties": er Lord Cowper, C., *Stamford* v. *Hobart* (1710), 3 Br. P. C. Toml. ed.) 31, at p. 33.

"Articles are considered [in equity] as minutes only, and the ettlement may afterwards explain more at large the meaning of he parties": *per* Lord Hardwicke, C., *Blandford* v. *Marlborough* 1743), 2 Atk. 542, at p. 545.

"If it is clearly to be ascertained from anything in the will hat the testator did not mean to use the expressions which he has mployed in their strict, proper, technical, sense, the Court, in ecreeing such settlement as he has directed, will depart from his ords, in order to execute his intention; but the Court must ecessarily follow his words, unless he has himself shown that he id not mean to use them in their proper sense; and have never aid that merely because the direction was for an entail, they would xecute that by decreeing a strict settlement": *per* Sir Wm. rant, M.R., *Blackburn* v. *Stables* (*supra*), at p. 370.

Inasmuch as it is obvious from the fact that a settlement is irected that it is not intended that the first taker shall take the e, land will not be limited in such a way as to enable the first aker to acquire the fee, and it is a rule that—

A limitation to one for life, with remainder to his heirs, or the heirs of his body, or his issue, will be construed so as to give him a life estate only.

First taker is not to have the fee.

"When the object is to make a provision by the settlement of

an estate for the issue of a marriage, it is not to be presumed th the parties meant to put it in the power of the father to defe that purpose, and to appropriate the estate to himself. If, ther fore, the agreement is to limit an estate for life, with remainder the heirs of the body, the Court decrees a strict settlement in co formity to the presumable intention": *per* Grant, M.R., *Blac burn* v. *Stables* (1814), 2 V. & B. 367, at p. 370.

See also *Jones* v. *Laughton* (1698), 1 Eq. Ca. Ab. 392; *Trev* v. *Trevor* (1720), 1 Eq. Ca. Ab. 387; 1 P. Wms. 622; 5 Bro. P. (Toml. ed.) 122; *Streatfield* v. *Streatfield* (1725), Ca. t. Talb. 17 *per* Lord Eldon, C., in *Jervoise* v. *Duke of Northumberland* (1820 1 J. & W. 559, at p. 574; 21 R. R. 229; *Davies* v. *Davies* (1841 4 Beav. 54; 55 R. R. 16; *per* Sugden, L.C., *Rochfort* v. *Fitzmauri* (1842), 2 Dr. & War. 1, at p. 20; 1 Con. & Law. 158; *per* Lo Cairns, *Sackville-West* v. *Holmesdale* (1870), L. R. 4 H. L. 54 at p. 572; 39 L. J. Ch. 505.

Gavelkind; or Borough-English.

It makes no difference in the construction of the articles th the land is gavelkind: *Roberts* v. *Dixwell* (1738), 1 Atk. 607; Borough-English: *Starkey* v. *Starkey* (1745), 8 Bac. Abr. 3 (7th ed.).

Thus a strict settlement was decreed in *Leonard* v. *Suss* (1705), 2 Vern. 526, where the words were "taking special ca in such settlement that it never be in the power of either of t said A and B to dock the entail": *Papillon* v. *Voice* (1728), P. Wms. 471, where money was given to be laid out in the pu chase of land to be settled on B for life, without impeachment waste, with remainder to trustees to preserve contingent remai ders, with remainder to the heirs of the body of B, with remainde over, with power to B to "make a jointure": *Lord Glenorc* v. *Bosville* (1733), Cas. t. Talb. 3; 1 Wh. & Tud. 1, where t settlement was to be made to A for life, without impeachment waste, voluntary waste in houses alone excepted, remainder to h husband for life, remainder to the issue of her body with remainde over: *White* v. *Carter* (1767), Amb. 670, where the settleme was to be made "as counsel should advise on A and the hei male of his body, to take in succession and priority of birth" *Bastard* v. *Proby* (1788), 2 Cox, 6; where the settlement was be made "as counsel should advise, in trust for A for life, a after her death, then on the heirs of her body lawfully issuin but in case A should die without leaving issue, etc.": *Shelton* *Watson* (1849), 16 Sim. 543; 18 L. J. Ch. 223; 80 R. R. 139, whe there was a direction to purchase an estate "to be made heredita and settled on my here constituted heir, and to descend to h heirs, or, dying without issue, as I shall now provide for. I herel constitute A my heir and successor; and the said estate, wh

urchased, is to be settled on him, his heirs and successors in the irect male line lawfully begotten and born in wedlock. In case ne said A die without issue," remainders over; "my object, ntent, desire and command, being that the said estate shall never ass out of my family, and that no person shall hold it under any ther name than the name of B": and *Thompson* v. *Fisher* 1870), L. R. 10 Eq. 207, where the settlement was to be made to the use of A and the heirs of his body lawfully issuing, but n such manner and form nevertheless, and subject to such restrictions and limitations as that if the said A shall happen to die ithout leaving lawful issue" the property should descend to estator's daughter. Also in *Delap* v. *Butler*, [1919] 1 Ir. Rep. h. 74 (a case on a will), where the words were "the lands of W be entailed and go to next heir, and not be sold or otherwise isposed of."

Agreement by husband in marriage articles to convey lands in rust for himself for life, and, if the intended wife survived him, o her use and that of their child or children; if no child, to the se of the intended wife and her heirs. *Held*, that the settlement ught to give the intended wife a life estate, with remainder to he children of the marriage: *Rossiter* v. *Rossiter* (1864), 9 Ir. ur. (N.S.) 373; affirming (1863), 14 Ir. Ch. R. 247.

In *Collins* v. *Plummer* (1708), 1 P. Wms. 104, land was limited o the husband and the heirs of his body with a covenant that the usband should not suffer a recovery, it was held that the deed as a settlement and could not be treated as articles, since it was lear that the parties intended to rely on the covenant.

There were moreover two exceptions to the rule: Exceptions.

First.—Where, in the case of articles executed prior to the Fines nd Recoveries Act, 1833, the property of the husband was settled n the wife and the heirs of her body: for this created an estate ail *ex provisione viri*, which could not be barred by either husband r wife alone: see *Greneley's Case* (1609), 8 Rep. 71 b; *Honor* v. *Ionor* (1710), 1 P. Wms. 123; *Whateley* v. *Kemp* (1734), cited Ves. Sen. 358; *per* Lord Hardwicke, *Green* v. *Ekins* (1742), 2 tk. 473, at p. 477; *Highway* v. *Banner* (1785), 1 Bro. C. C. 584; *er* Lord Hatherley, C., *Sackville-West* v. *Holmesdale* (1870), L. R. H. L. 543, at p. 554. But this exception does not exist when he articles are made after 1833: *per* Sugden, L.C., *Rochfort* v. *itzmaurice* (1842), 2 Dr. & War. 1, at p. 19; 59 R. R. 617. Where one parent alone could not defeat settlement.

Second.—If part of the land be by the articles themselves ettled in strict settlement, and other part be limited to the first aker, and the heirs of his body; for this shows that the parties new how to limit the estate in strict settlement when they wished do so: *Chambers* v. *Chambers* (1730), Fitz-G. 127; Mos. 333; Where articles settle part strictly.

2 Eq. Ca. Ab. 35, pl. 4; *Howel v. Howel* (1751), 2 Ves. Se 358.

Trustees to preserve.

Formerly, where the Court decreed a strict settlement, inserted proper limitations to trustees to preserve contingen remainders: *Stamford* v. *Hobart* (1710), 3 Bro. P. C. (Toml. ed 31; *Baskerville* v. *Baskerville* (1741), 2 Atk. 279; *Harrison* v *Naylor* (1790), 2 Cox, 247; 3 Bro. C. C. 108; *Woolmore* v. *Burrow* (1827), 1 Sim. 512; 27 R. R. 225.

General power of appointment not given.

Upon similar principles a general power of appointment, whic would have enabled the appointor to defeat the whole settlemen was cut down to a special power to appoint amongst children *Bristow* v. *Warde* (1794), 2 Ves. Jun. 336; 2 R. R. 235; but Lor St. Leonards observes (Sugd. Pow. (8th ed.), p. 439) that th case must not be considered as establishing a general rule; ar see Chance on Powers, c. 5, s. 2, p. 143; the principle was followe in *Gould* v. *Gould* (1856), 25 L. J. Ch. 642; 2 Jur. (N.S.) 48 106 R. R. 948, a case on an executed settlement; but in *Wood* v *Wood* (1870), L. R. 10 Eq. 220, Lord Romilly, M.R., refused follow *Gould* v. *Gould* in construing an *executed* settlement. H Lordship said: "The general principle is that a general power appointment cannot be cut down to a limited power of appoin ment among children, except by express words"; and he he that "on the general scope of the deed" before him the gener power could not be cut down.

And in *Peover* v. *Hassel* (1861), 1 J. & H. 341; 30 L. J. C 314; 128 R. R. 403; *Bristow* v. *Warde, supra,* was distinguish as (1) not establishing a rule of general application; (2) on t distinction existing between an executed settlement and executo articles; (3) on the particular words of the appointment.

Life estates. Impeachment for waste.

The question whether life estates limited in pursuance of executory trust are to be made impeachable for waste is discuss in *Leonard* v. *Sussex* (1705), 2 Vern. 526; *White* v. *Briggs* (184 15 Sim. 17; 2 Ph. 583; 15 L. J. Ch. 182; 78 R. R. 203; *Davenpo* v. *Davenport* (1863), 1 H. & M. 775; 32 L. J. Ch. 33; 136 R. 345; *Stanley* v. *Coulthurst* (1870), L. R. 10 Eq. 259; 39 L. Ch. 650; and *Sackville-West* v. *Holmesdale* (1870), L. R. 4 H. 543; 39 L. J. Ch. 505. The principle appears to be that if t settlor or testator has expressly directed a life estate to be give it must be made liable to impeachment for waste; but, on the oth hand, if the words used would *per se* give the first taker an est of inheritance, the life estate to which it is cut down is not to made impeachable for waste: see 3 Dav. Conv. p. 280, note (

Life estate without power of anticipation.

In *Clive* v. *Clive* (1872), 20 W. R. 477, where, by the articl a life estate was given to a woman without power of anticipatio it was held that it should not be *sans* waste, as a life estate *sa*

ıste would be inconsistent with a life estate without power of ticipation; but as to this doctrine see *Re Lumley; ex p. Hood-ırrs*, [1896] 2 Ch. 690; 65 L. J. Ch. 837.

A further rule on the subject is this :—

> A remainder to heirs, heirs of the body, or issue will be construed so as to create a strict settlement on sons successively in tail, with remainder to daughters as tenants in common in tail, with cross remainders between them.

Heirs, or heirs of body, means sons to take successively in tail, daughters as tenants in common in tail, with cross remainders.

[For words of limitation and the new law, see Chapter XVI.]

The rule is applied even in cases where no express limitation r life is made to the parent in the articles, so that the rule in *ıelley's Case* does not apply, and a settlement made strictly in nformity with the articles would not be liable to be defeated by m: *Griffith* v. *Buckle* (1686), 2 Vern. 13; *Cusack* v. *Cusack* 714), 5 Bro. P. C. (Toml. ed.) 116; *Grier* v. *Grier* (1872), L. R. H. L. 688.

Rule is the same where there is no express estate for life to parent.

The case of *Nandick* v. *Wilkes* (1716), 1 Eq. Ca. Ab. 393, pl. 5; C. *sub nom. Nandike* v. *Wilkes*, Gilb. Eq. Rep. 114, shows that heirs of the body" mean, and the cases of *Hart* v. *Middlehurst* 746), 3 Atk. 371; *Dod* v. *Dod* (1755), Amb. 274; *Prebble* v. *oghurst* (1818), 1 Swanst. 309 (see p. 332); *Trevor* v. *Trevor* 1842), 13 Sim. 108; 11 L. J. Ch. 417; 73 R. R. 58; (1845), 1 . L. C. 239; *Phillips* v. *James* (1865), 2 Dr. & Sm. 404; 3 De . J. & S. 72; 13 W. R. 934; 143 R. R. 200, show that "issue" eans, both sons and daughters. In all these cases, except *Prebble* . *Boghurst*, where the point did not arise for decision, it was eld that the sons took successive estates in tail with remainder the daughters in tail; and, after some conflict of authorities, it ppears to be the better opinion that the latter take as tenants in ommon in tail with cross remainders: *West* v. *Errissey* (1727), P. Wms. 349; 1 Bro. P. C. 245; *Phillips* v. *James*, *supra*.

The reason for the rule is stated in *Grier* v. *Grier* (1872), L. R. H. L. 688, by Lord Cairns, who says (at p. 706): "In executing ıis provision in the marriage articles, the Court of Chancery would ave made, under the term 'issue,' a provision in some way or ther for the whole of the children of the marriage both male and male . . . by raising and creating estates tail; because otherwise ıe first line only would have been provided for, whereas the term issue,' as we know, includes descendants *ad infinitum*. . . . The ıly question which remains . . . is this: Would the interest . . have been created by giving estates tail to the children con-ırrently, or would it have been created by giving estates tail to

them successively ? In either case you provide for the childr of the marriage, or the issue of the marriage, *ad infinitum*. . I entirely agree with the observation made in the Court belo that great weight is to be attributed to the term which is use namely, 'settle.' As I understand that word, it must mean th that the husband agrees to settle—that is to say, to make a sett ment of—the property upon the issue of the marriage. And th being the meaning of the word 'settled,' I hold it to be established rule, . . . that when after a life estate is either giv or reserved to the father upon the occasion of a marriage, the is a contract to make a settlement of real estate upon the issue the marriage that must be effected by giving successive estat tail to the children of the marriage. . . . The reason . . . is this that the rule which the Court of Chancery has laid down for its is, in limiting estates by way of purchase to the issue of a marriag to go as near as possible to that line of devolution of the proper which would have taken place if the father in the first instan had remained the proprietor of an estate tail. In that case t estate would have gone first to the sons in succession, and th to the daughters as heirs of tail together. And while the Cou of Chancery secures to the children estates by way of purcha which cannot be defeated by the parent, it preserves at the sa time the line of devolution, *cy-près*, as near as possible to th line which would have been followed if the father had taken fi an estate tail."

Settle.

"Issue, their heirs and assigns for ever."

The same construction was placed on "issue, their heirs a assigns for ever," by Kindersley, V.-C., in *Phillips* v. *James* (186 2 Dr. & Sm. 404, on the ground that if the words "their he and assigns" had been omitted there would have been enou to give estates tail to the children as purchasers, and that t addition of the words "their heirs and assigns for ever" cou make no difference. This decision was affirmed on appeal, 3 De J. & S. 72; 13 W. R. 934, Knight-Bruce, L.J., dissenting.

Form of gift over.

In *Dillon* v. *Blake* (1864), 16 Ir. Ch. R. 24, by a post-nupt agreement for valuable consideration, land was to be settled up B, eldest son of A, "and his issue," with remainder, in the eve of B dying in the lifetime of A without lawful issue, "to each the other sons of A in succession according to their seniority, wi an ultimate remainder to the right heirs of A. B survived A a had issue. *Held*, that B was entitled to an estate tail in possessi with remainder to himself in fee. The decision turns on the fo of the gift over on B's death.

Where the direction was to settle land to the use of every s of J S and his assigns during his life; and after his decease to t use of such son's first and other sons successively in tail male, a

failure of such issue to the use of the settlor's heirs. *Held*, ıt the sons took as tenants in common for life, with remainder to each son's share to his first and other sons in tail male with ıss remainders over : *Surtees* v. *Surtees* (1871), L. R. 12 Eq. 400. t this case was distinguished in *Re Harcourt*, [1920] 1 Ch. 492; L. J. Ch. 655 (a case on a will), where, in favour of the con-ıtion that the sons took successively, the rule enunciated by John Stuart, V.-C., in *Cradock* v. *Cradock*, 4 Jur. (N.S.) 626, s stated thus and applied : " The rule was this, that if in a will ere be found a consistent scheme provided by the testator for e distribution of his property, anything doubtful in the language ıich he had used must be construed so as to make it consistent th the general scheme of the will."

"Issue, whether son or daughter."

The words " issue, whether son or daughter, if begotten on the dy of, etc.," were held to make the children take as tenants in mmon (apparently in fee), with cross limitations over on the ath of any child under twenty-one, and without issue : *Taggart* *Taggart* (1803), 1 Sch. & Lef. 84; 9 R. R. 19.

"Shares."

In *Thompson* v. *Simpson* (1841), 1 Dru. & War. 459; 58 R. R. 8, where there was a covenant to settle land on trust " for the ıue of H by N," in such shares as H should appoint, and in fault as N, in case she survived H, should appoint, it was held at in default of appointment the children took as tenants in mmon in fee simple.

"Heirs of the body," following limitation to "heirs male of the body."

Where the words " heirs of the body " are inserted after a nitation to " heirs male of the body," they may point not to oviding for the daughters of the settlor, but only to letting in e daughters of the sons, by giving estates in tail general to the ns.

This construction will be aided if the articles make provision r the settlor's daughters by way of portions. It prevailed in owell v. *Price* (1729), 2 P. Wms. 535; 2 Eq. Ca. Ab. 40, where e provisions for the children were to the use of the sons of the arriage " in tail male successively, remainder to the heirs male the body " of the settlor by any wife, remainder to " the heirs his body " by the intended wife, and for want of such issue mainder to the right heirs of the settlor; it was provided that the settlor should die without issue male by his intended wife, ıd there should be daughters, portions should be raised for such ıughters. See the remarks on this case in *Maguire* v. *Scully* 828), 2 Hog. 113, at p. 138; Beatt. 370.

"Heirs male of the body," or "issue male."

But if provision is made for the " heirs *male* of the body " or issue *male*," the sons take successively in tail *male*, and ıughters do not take : *Cusack* v. *Cusack* (1714), 5 Bro. P. C. Toml. ed.) 116; and *Brennan* v. *Fitzmaurice* (1839), 2 Ir. Eq. R.

113, where the words were " heirs male of the body " : *Trevor* *Trevor* (1720), 5 Bro. P. C. (Toml. ed.) 122; 1 Eq. Ca. Ab. 38 1 P. Wms. 622, where the words were " heirs male of the bo and the heirs male of such heirs male issuing " : *Maguire* v. *Scul* (1828), 2 Hog. 113; Beatt. 370.

"First male issue."

" First male issue lawfully begotten which should attain t age of twenty-one years " means the first son who attains twent one : *Hampson* v. *Brandwood* (1816), 1 Madd. 381.

"Issue male."

Where the articles reserved a power to the wife to appoint " her issue male by the intended husband." *Held*, that a s of her daughter by him was not an object of the power : *Lamb* v. *Peyton* (1860), 8 H. L. C. 1; 125 R. R. 1.

"Heirs female of the body."

And " heirs female of the body " means daughters : *West* *Errissey* (1726), 2 P. Wms. 349; 1 Bro. P. C. (Toml. ed.) 22

Where land was directed " to be purchased to be added a closely entailed to the family estate, now in the possession of T the object being to have a head to the family, and if T B di without male issue or disposing of the family estate, the resid to go to A B or his nearest relative in the male line." *Held*, th the settlement ought to be on A B for life, with remainder to sons successively in tail male, with remainder to his brothers bo and to be born in similar manner, but that no estates should limited to any ancestor of A B : *Woolmore* v. *Burrows* (182 1 Sim. 512, at p. 529; 27 R. R. 225.

Settlement of personalty with ultimate trust for the wife's ne of-kin, with a covenant to settle after-acquired property " on t like trusts." *Held*, that after-acquired realty belonged on t wife's death to her heir-at-law : *Brigg* v. *Brigg* (1885), 33 W. 454; 54 L. J. Ch. 464.

Rule against perpetuities.

Moreover, although the limitations directed to be inserted the settlement would, if inserted in the words directed by t articles, be too remote, the direction will not be void, but t settlement will be framed, so as, as far as possible, to give eff to the intention without containing limitations which would too remote.

Thus where a settlement directed certain trustees to settle r estates to the use of such persons for such estates and in su manner that the same should, so far as the law would permit, strictly settled so as to go along with a peerage so long as t person possessed thereof should be a lineal descendant of t settlor, and that during every suspension or abeyance of the sa dignity, within the limits prescribed by law for strict settlemen the rents of the estates might be equally divided among the co-he *per stirpes* of the person or persons respectively, by reason whose death or deaths without issue male such suspension or ab

e should be, for the time being, occasioned, it was held that trust was not void for remoteness: *Bankes* v. *Le Despencer* 340), 10 Sim. 576; 9 L. J. Ch. 185; 51 R. R. 313.

If freeholds are settled in strict settlement, and there is a covenant to settle personalty on like trusts, a proviso must be inserted that it shall not vest absolutely in any tenant in tail by purchase who dies under the age of twenty-one without leaving issue.

Covenant to settle personalty by reference to strict settlement of realty.

[*In view of the fact that personalty is entailable under the w law the above rule is of diminishing practical importance.*]

Jekyll, M.R., considered that the proper plan was to insert a t over on the death of the tenant in tail under twenty-one: *anley* v. *Leigh* (1732), 2 P. Wms. 686, at p. 690; Lord Hardcke, C., suggested that it should be on his death without issue fore twenty-one: *Gower* v. *Grosvenor* (1740), Barn. Ch. Rep., at p. 63; 5 Madd. 337, at p. 348; and Lord Loughborough, C., ve an express decision to this effect in *Newcastle* v. *Lincoln* 797), 3 Ves. 387; 4 R. R. 31, but before the appeal to the House Lords (*Lincoln* v. *Newcastle* (1806), 12 Ves. 218; 4 R. R. 31), e first tenant in tail had attained the age of twenty-one, and erefore the only point there decided was that he had become solutely entitled.

"Where the trusts" (*i.e.*, of personalty) "are executory . . . ere has been considerable difference of opinion, and I do not nsider the law as finally settled by authority; but if it is so, it in favour of the introduction of particular conditions, such as e attainment of twenty-one, into the limitations. Such a straint was certainly upheld in *Lady Lincoln* v. *Duke of Newstle*. That case, however, may be open to observation, Lord ldon having always protested against it": *per* Page Wood, V.-C., *carsdale* v. *Curzon* (1860), 1 J. & H. 40, at p. 51; 29 L. J. Ch. 9; 128 R. R. 255. See also *Re Beresford-Hope*, [1917] 1 Ch. 37, at p. 298; 86 L. J. Ch. 182.

A collection of forms used by eminent conveyancers will be und in *Harrington* v. *Harrington* (1871), L. R. 5 H. L. 87, at 93, n.; 40 L. J. Ch. 716, from which it appears that the form ving over the property on death under twenty-one without issue d been adopted by the Court.

Personalty

It is difficult to lay down any rule for the construction of ticles for the settlement of personalty.

The cases on settlements directed by wills throw but little light

Articles and wills distinguished.

on the construction of marriage articles, because, in the form case, there is nothing but the words of the will to guide t construction; while in the latter case the parties must ha intended to provide for the wife and issue of the marriage.

Restraint on anticipation.

If the articles expressly provide for the settlement of the wif property on her for life "for her separate use," the Court will n add a restraint on anticipation: *Symonds* v. *Wilkes* (1865), W. R. 1026, reversing 12 W. R. 541; but if separate use is left implication the restraint on anticipation will be inserted: *Stanl* v. *Jackman* (1857), 23 Beav. 450; possibly the real distincti between these cases is that in *Symonds* v. *Wilkes* the articles we not strictly speaking executory: and in *Re Dunnill's Trusts* (187 Ir. R. 6 Eq. 322; and *Dowd* v. *Dowd*, [1898] 1 Ir. R. 244 (bo will cases), though there was a provision that the property shou be settled "for her separate use," the Court added a restraint anticipation.

Children take as tenants in common;

It appears that the Court inclines to make children take tenants in common rather than as joint tenants: *Liddard* *Liddard* (1860), 28 Beav. 266; *Mayn* v. *Mayn* (1867), L. R. 5 E 150; but in *Re Bellasis' Trust* (1871), L. R. 12 Eq. 218, wh the words were "for my niece and her children," it was held th the children took as joint tenants after the niece's death.

at twenty-one, or in case of daughters, on marriage.

Where marriage articles provided for the wife's property bei vested in trustees, "the trusts of the income being for the ben of the said *husband* and *wife* during their lives, and the trusts the capital being for and amongst the children according to t appointment of the said *husband* and *wife*, or the survivor them; and in default of appointment, for the children equal and in the event of there being no children, and of the s *husband* being the survivor, the trust property to be at absolute disposal." *Held*, that the articles ought to be carr into effect by giving the wife the first life interest to her separ use, and by making the shares of sons contingent on their atta ing twenty-one, and of daughters on their attaining twenty- or marrying, or by inserting clauses of survivorship and accru on the deaths of sons under twenty-one, and of daughters un that age unmarried: *Cogan* v. *Duffield* (1876), 2 Ch. D. 44; L. J. Ch. 307.

Power of appointment amongst children.

And a power for the husband and wife by deed or the survi by deed or will to appoint among the children should be insert *Re Gowan* (1880), 17 Ch. D. 778; 50 L. J. Ch. 249 (a case o will); unless there is a direction for equal division: *Re Par* (1886), 33 Ch. D. 274 (a case on a will); the power should be given to the wife only, even if the fund is hers: *Cogan* *Duffield* (*supra*), at p. 49 (a case on articles); *Re Gowan* (*sup*

ering from *Oliver* v. *Oliver* (1878), 10 Ch. D. 765; 48 L. J. Ch. 0 (a case on articles).

Hotchpot clause.

A hotchpot clause should now be inserted. Thus, in *Miller* v. *lson* (1884), 13 L. R. Ir. 408, Chatterton, V.-C., says (at 428): "Then comes the question whether the hotchpot clause one of those usual clauses which would be inserted as of course. . I had occasion to consider a similar question in *Lees* v. *Lees* 871), Ir. R. 5 Eq. 549, as to articles executed in 1811, and ived at the conclusion that it was not shown that at that time e hotchpot clause was so usual as to authorise its being introced. The articles here are nineteen years later in date, and ving regard to the authorities and precedents referred to, I am opinion that a hotchpot clause would be introduced into a tlement executed in pursuance of them."

Trusts in default of children.

Where a fund of personalty was given by deed, apparently luntary, by a man to his daughter to be settled "upon her and r issue," so that during her lifetime "the same might not be ble or subject to the debts, control, or engagements of any sband" whom she might marry. *Held*, that the settlent ought to give the daughter a power of appointment by ll in default of issue: *Stanley* v. *Jackman* (1857), 23 Beav. 0.

Ultimate trusts.

In *Kentish* v. *Newman* (1713), 1 P. Wms. 234, the covenant as to invest a sum of money in the purchase of an annuity to settled on the husband and wife for their lives, remainder to e heirs of their bodies, remainder to the husband in fee, and ntil the settlement should be made the money was to be applied r the separate use of the wife; if no settlement was made during e joint lives of the husband and wife, the money was to be to e sole use of the wife, if living, but if she died before her husband, her brother and sister. It was held that the brother and sister the wife took only if she predeceased her husband without aving issue.

A father, on his daughter's marriage, agreed by a memorandum writing "to charge my property with £1,000 as her fortune, be settled in trustees for her benefit, she to receive the interest 5 per cent. on her sole and separate receipt during the term of er natural life; but if she has a family, she is to have the power disposing of it amongst her children in such shares and proortions as she and her husband may think proper; I to have the ower to lodge the £1,000, with her consent and that of her ustee, in any security we may agree upon." No settlement was ver executed, and the wife died without issue. *Held*, that the usband, as his wife's administrator, was entitled to the £1,000 nd to specific performance against the father, notwithstanding

the contention of the father that there was a resulting trust f him: *Dennehy* v. *Delany* (1876), Ir. R. 10 Eq. 377.

Policies effected under Married Women's Property Act.

By section 11 of the Married Women's Property Act, 1882 (& 46 Vict. c. 75), "a policy of insurance effected by any man his own life and expressed to be for the benefit of his wife or his children or of his wife and children or any of them . . . sh create a trust in favour of the objects therein named." This practically a re-enactment of section 10 of the Married Women Property Act, 1870. Policies issued under these sections appe generally to state that they are "for the benefit of his wife and of the children of their marriage." If they so provide t widow and children take as joint tenants: *Re Seyton* (1887), Ch. D. 511; 56 L. J. Ch. 775 (explaining *Re Mellor's Policy Tru* (1877), 7 Ch. D. 200; 47 L. J. Ch. 246; and *Re Adam's Poli Trusts* (1883), 23 Ch. D. 525; 52 L. J. Ch. 642); *Re Davies' Poli Trusts*, [1892] 1 Ch. 90; 61 L. J. Ch. 650. Where the policy w expressed to be "for the benefit of his wife and children," second wife and a child of the second marriage were held entitl to participate jointly with the children of the wife to whom t assured was married at the date of the policy: *Re Browne's Polic* [1903] 1 Ch. 188; 72 L. J. Ch. 85; and where the words we "for the benefit of his wife, or if she be dead, between his childr in equal proportions" it was held that the children of a seco marriage were, but a second wife was not, entitled to participat followed in *Re Parker's Policies*, [1906] 1 Ch. 526; 75 L. J. C 297; *Re Griffith's Policy*, [1903] 1 Ch. 739; 72 L. J. Ch. 330.

"Issue" meaning "children."

Whether the articles relate to realty or perso alty, the word "issue" may be explained to me "children."

Where, according to the terms of the articles, the husband w to have a general power of appointment, and in default of appoi ment the trust fund was to be divided among "the issue of t marriage," it was held, first, that the power intended must, fro the circumstances and purpose of the instrument, be taken to only a limited power to appoint to "issue of the marriage," an secondly, that "issue of the marriage" was to be constru "children": *Bristow* v. *Warde* (1794), 2 Ves. Jun. 336; 2 R. 235.

By articles made for value after marriage it was agreed th leases for lives and years should be conveyed to trustees, in tru for A and B successively for life, and after the death of B for t "issue" of B and C (his wife) as B should appoint, and in defa for "such children" share and share alike, and in default "such issue," for the heirs, executors, and administrators of t

d B during the said leases: and that a sum of money, or the ıds agreed to be purchased therewith, should go (after the deaths B and C) to "the issue" of the said B and C, as B and C or the vivor should appoint, and in default should be equally divided ıong "such children" share and share alike, and if there should no "issue" of the said marriage, or if all "such issue" should under twenty-one, over. *Held*, that "issue" must be read children": *Campbell* v. *Sandys* (1803), 1 Sch. & Lef. 281; 9 R. 33.

By marriage articles a reversionary interest in personalty was reed to be settled on the husband and wife successively for life, d after the death of the survivor on the "issue of the marriage" ing at the death of the survivor of the husband and wife as the sband should appoint, and in default of appointment then on such issue" in equal shares if more than one, and if but one, en the whole to go to "such only child"; and if there should be "issue of the marriage" living at the death of the survivor of e husband and wife, then as the husband should appoint. *Held*, ıt "issue" meant "children": *Swift* v. *Swift* (1836), 8 Sim. 8; 5 L. J. Ch. 376; 42 R. R. 145.

Articles on marriage to settle freeholds, after the death of the sband, to "go to and be vested in the issue of" the husband and fe, "and that such issue should also be entitled to a further sum £1,000" (to be charged on other property) "in such shares and ɔportions as" the husband should appoint; in default, as the fe should appoint; and in default, "in equal shares if there ɔuld be more than one of such issue born in the said (husband's) etime, or in a reasonable time after his death." *Held*, that issue" meant "children": *Thompson* v. *Simpson* (1841), 1 Dr. War. 459; 58 R. R. 298.

By marriage articles it was agreed that the trustees of a money ıd, after the decease of the husband, should pay the residue of e interest and also the principal sum (subject to an annuity by y of jointure for the wife) to the "issue of the said intended ırriage," as the husband should appoint; and in default of pointment, to "all the issue" in equal shares, "to such of the d issue" as should be sons, at twenty-one, and to such of them should be daughters, at twenty-one or marriage; and that there ɔuld be a power of advancement for "the said issue of the rriage" to the extent of one-half of the share of "such child pectively"; and if there should be "no issue of the intended rriage, or all such issue should die in the lifetime of" the sband, then the whole trust fund should (subject to the jointure) t and be assigned, and go to the husband, his heirs, executors, ., absolutely, for his and their sole use and benefit. And it was

further agreed that a regular deed of settlement should be execute which should contain the several clauses and covenants in su cases usual and proper. *Held*, that the word " issue " was to read " children " : *Roche* v. *Roche* (1845), 2 Jo. & Lat. 561.

Power to appoint to "issue."

In *Bell* v. *Bell* (1862), 13 Ir. Ch. R. 517, a power of appoi ment in favour of issue was on the context explained to mean power to appoint life estates only to the children alive at the da of the deed, with remainders to their issue in strict settlement.

By marriage articles it was agreed that personalty should settled upon trust (after the deaths of husband and wife) for " t issue of the intended marriage " as the husband should appoi " but if only one child," for " such only child." There was trust for the children in default of appointment. It was he that " issue " meant " immediate issue " or children : *Lees* v. *Le* (1871), Ir. Rep. 5 Eq. 549, at p. 558.

As to the powers to be inserted.

The powers to be inserted in a settlement will be the sa whether the instrument directing the settlement to be made is will, marriage articles, or voluntary settlement.

There is a palpable difference (see *per* Shadwell, V.-C., *Hill* *Hill* (1834), 6 Sim. 136, at p. 144) between powers of managemen such as powers of leasing or of sale, which are to be exercised f the benefit of the estate, and powers of charging the estate, su as powers of jointuring, and of charging portions.

It was formerly considered that no powers ought to be insert in the settlement, unless they were expressly authorised by t instrument directing the settlement to be made : see *Wheate* v. *H* (1810), 17 Ves. 80 ; *Brewster* v. *Angell* (1820), 1 J. & W. 625.

According to the modern practice—

Powers of management are, powers of charging are not, inserted.

> Powers of management will generally inserted in the settlement (unless they are omitt in reliance on the Settled Land Act, 1925), whi powers of charging will not be inserted.

Expressio unius, &c., not now applied.

It was once thought that the doctrine of *expressio unius* *exclusio alterius* was applicable in determining what powers shou be inserted, and that if the executory instrument expressly direct the insertion of specified powers, the words " usual powers coming afterwards would only authorise the insertion of such usu powers as were *ejusdem generis* as those specially authorise *Pearse* v. *Baron* (1821), Jac. 158 ; *Hill* v. *Hill* (1834), 6 Sim. 1 at p. 141 ; or even would not authorise the insertion of any oth powers : *Brewster* v. *Angell* (1820), 1 J. & W. 625 ; *Horne* v. *Bart* (1822), Jac. 437 ; unless the words were in a distinct claus *Lindow* v. *Fleetwood* (1835), 6 Sim. 152. But this doctrine wou not now be followed.

Sale and exchange.

Though it was formerly thought that a power of sale and xchange could not be inserted without express directions: *Wheate . Hall* (1810), 17 Ves. 80; *Brewster* v. *Angell*, *supra*; and *Horne . Barton* (1822), Jac. 437 (all cases of wills); it appears now to e the rule that whether there is a simple direction to settle: *urner* v. *Sargent* (1853), 17 Beav. 515; 99 R. R. 269; *Wise* v. *iper* (1880), 13 Ch. D. 848; 49 L. J. Ch. 611; or a direction that ne settlement shall contain all usual clauses: *Peake* v. *Penlington* 1813), 2 V. & B. 311; *Hill* v. *Hill* (1834), 6 Sim. 136; *Duke of edford* v. *Marquess of Abercorn* (1836), 1 Myl. & Cr. 312; 5 L. J. h. 230; 43 R. R. 200; a power of sale and exchange ought to be nserted.

Realty subject to same trusts as personalty.

In *Williams* v. *Carter* (1818), Sugd. Pow. (8th ed.), Append., . 945; and in *Elton* v. *Elton*, No. 2 (1860), 27 Beav. 634; 122 t. R. 567, where realty became, by the operation of a covenant for ettling after-acquired property, subject to the same trusts as ersonalty, as to which latter there was a power to vary investnents, it was held that the settlement of the real estate ought to ontain a power of sale and exchange, such power being as to ealty analogous to the power to alter and vary given in respect f the personalty.

Where a settlement of personalty contained a power to the rustees to invest in the purchase of land to be held "upon such rusts as would best correspond with the then subsisting trusts," nd that such purchased land "should be considered as personal state for the purposes of the settlement," and there was no express ower of sale over the lands so to be purchased, but there was a ower to vary the investments of the settled personalty. *Held*, hat the trustees had a power of sale over purchased land: *Tait* v. *athbury* (1865), L. R. 1 Eq. 174; 147 R. R. 58.

Aliens.

In *Master* v. *De Croismar* (1848), 11 Beav. 184; 17 L. J. Ch. 66, where the husband and some of the children were aliens, it as held that realty, becoming, by virtue of a covenant to settle fter-acquired property, subject to trusts similar to those of perpnalty, must be sold; but this would not now be necessary as an lien can now acquire, hold and dispose of land in the same manner all respects as a natural-born British subject: Naturalization ct, 1870, s. 2 (*a*).

Where by marriage articles the husband covenanted to settle is estate, subject to raising by any ways or means that he should ink proper the sum of £15,000 by mortgage or otherwise. *Held*, at he might raise the £15,000 by sale: *Tasker* v. *Small* (1834), Sim. 625; 5 L. J. Ch. 321; 45 R. R. 212.

Power to give receipts.

Where a power of sale ought to be given to the trustees, a power

(*a*) Repealed by the British Nationality and Status of Aliens Act, 1914.

to give receipts would formerly also be given to them : *Turner* v *Sargent* (1853), 17 Beav. 515. But where on the construction of will a power of sale by the tenant for life was to be inserted the settlement, he was not allowed a power to give receipts : *Cox* v *Cox* (1855), 1 K. & J. 251. The power to trustees to give receip can now be omitted, in reliance on the Conveyancing Act, 188 s. 36; and the Trustee Act, 1893, s. 20 (replaced by section 14 the Trustee Act, 1925).

Power to vary securities.

A power to vary securities was inserted in *Sampayo* v. *Gou* (1842), 12 Sim. 426; 11 L. J. Ch. 121.

Partition.

A power to partition would be inserted if a share only we settled : *Hill* v. *Hill* (1834), 6 Sim. 136, at p. 145.

Powers of leasing.

In *Hill* v. *Hill* (1834), 6 Sim. 136, Shadwell, V.-C., was opinion that a direction to settle authorised the insertion of (*int alia*) "powers of leasing, . . . and where there . . . are a mines, or any land fit for building purposes, powers of leasi mines, and of granting building leases," such powers being ben ficial to all parties. But where the articles stipulated for a pow to lease for twenty-one years, and all other usual powers, it w held that the insertion of a power to grant building leases for longer term was not authorised : *Pearse* v. *Baron* (1821), Jac. 15

Where the articles (on a marriage in Scotland) stipulated that settlement of estates in Ireland should contain "all the covenant provisions and conditions usually contained in marriage sett ments made in England," and the draft settlement contain powers to grant building, repairing and mining leases, a referen was ordered to inquire whether the proposed powers were comm in that part of Ireland in which the estates were situate : *Duke Bedford* v. *Marquess of Abercorn*, *supra*, p. 691.

Powers of granting mining leases.

In a settlement of personal property, the parties covenanted settle all future-acquired property upon the same trusts, etc., a subject to the same powers, etc., or as near thereto as the natu and tenure of the property would admit. *Held*, that this covena authorised the insertion in the settlement of subsequently-acquir freeholds, of a power to grant mining leases, the prior ow having granted such leases, though the mines had never be effectually worked under them : *Scott* v. *Steward* (1859), 27 Be 367; 122 R. R. 438.

Maintenance, education, and advancement.

Powers of maintenance, education, and advancement, w directed to be inserted in the settlement in *Turner* v. *Sarg* (1853), 17 Beav. 515, where by codicil the testator directed follows : "I further direct that all the property, real or person given in my said will to my daughter J, shall be so settled, to t exclusion of her present or any future husband, that the same m belong to my said daughter during her life, and be secured for t

enefit of her children, if more than one, equally, after her death,) that the issue of any such child dying in my daughter's lifetime ıay take his or her parent's share."

In the case of trusts constituted or created after 1925 the usual ower of advancement will be implied, subject to any contrary ıtention appearing on the face of the instrument creating the rust. But this is only the case where the trust property consists f money or securities or of property held upon trust for sale, and ıch money or securities or the proceeds of such sale are not by atute or in equity considered as land or applicable as capital ıoney under the Settled Land Act, 1925 : section 32 of the Trustee ct, 1925; as to maintenance, see section 31 of the Trustee Act, 925. New Law.

A power to appoint new trustees was inserted in *Lindow* v. *leetwood* (1835), 6 Sim. 152; and in *Sampayo* v. *Gould* (1842), 12 im. 426; 11 L. J. Ch. 121, where the contract of marriage was rawn up in the Portuguese language and executed according to ıe law of Portugal, where the parties were residing, and contained statement that the parties wished that it should be regulated, ıade binding, and carried into full and complete effect under the ıws of England. A like power was inserted in a settlement made ı pursuance of the directions contained in a will in *Turner* v. *argent* (1853), 17 Beav. 515. Power to appoint new trustees.

On the other hand powers to charge portions : *Higginson* v. *arneby* (1826), 2 S. & S. 516; 25 R. R. 256; *Grier* v. *Grier* (1872), . R. 5 H. L. 688; or to jointure : *Duke of Bedford* v. *Marquess f Abercorn* (1836), 1 My. & Cr. 312; are not inserted in the bsence of special directions. But in *Sackville-West* v. *Holmesdale* 1870), L. R. 4 H. L. 543; 39 L. J. Ch. 505, the insertion of these owers was under special circumstances authorised. Powers to portion or jointure.

If marriage articles and a settlement are both made before marriage, the settlement will be considered as superseding the articles, unless the settlement be expressly stated to have been made in pursuance of the articles, or unless it can be otherwise shown that the settlement was intended to carry out the articles, and that any difference between the two instruments has arisen by mistake : but if the articles are made before, and the settlement after, marriage, the articles will control the settlement.

Articles and settlement both before marriage, settlement controls.

Articles before, and settlement after, marriage, articles control.

"Where articles are entered into before marriage, and settle-

ment made after marriage different from those articles (as if b
articles the estate was to be in strict settlement, and by the settl
ment the husband is made tenant in tail whereby he hath it in h
power to bar the issue), this Court will set up the articles again
the settlement; but where both articles and settlement are previo
to the marriage, at a time when all parties are at liberty, th
settlement differing from the articles will be taken as a new agre
ment between them, and shall control the articles. And althoug
in the case of *West* v. *Errissey* (1726), 2 P. Wms. 349; (1727
1 Bro. P. C. (Toml. ed.) 225, the articles were made to control th
settlement made before marriage, yet that resolution no ways co
tradicts the general rule; for in that case the settlement w
expressly mentioned to be made in pursuance and performance
the marriage articles, whereby the intent appeared to be still th
same as it was at the making of the articles" : *per* Talbot, L.C
Legg v. *Goldwire* (1733), Ca. t. Talb. 20. In *Honor* v. *Hon*
(1710), 1 P. Wms. 123; *West* v. *Errissey* (1726), 2 P. Wms. 34
1 Bro. P. C. (Toml. ed.) 225; and *Roberts* v. *Kingsly* (1749
1 Ves. Sen. 238, where, although the settlement was made befo
the marriage, it was expressly stated to be made in pursuance
the articles; and in *Randall* v. *Willis* (1800), 5 Ves. 262; 5 R. R
40, where the settlement was made after the marriage; it was he
that the settlement must be controlled by the articles.

In *Bold* v. *Hutchinson* (1855), 5 De G. M. & G. 558; (25 L.
Ch. 598; 104 R. R. 196), on app. from 20 Beav. 250, Lord Cra
worth, C., says (at p. 568): "The doctrine now is, that when
settlement purports to be in pursuance of articles entered in
before marriage, and there is any variance, there no evidence
necessary in order to have the settlement corrected; and althou
the settlement contains no reference to the articles, yet, if it c
be shown that the settlement was intended to be in conformi
with the articles, yet if there is clear and satisfactory eviden
showing that the discrepancy had arisen from a mistake, the Cou
will reform the settlement and make it conformable to the re
intention of the parties."

Where the only evidence of the articles was a recital, not pu
porting to give the *ipsissima verba* of the articles, in a post-nupti
settlement, it was held that the settlement, and not the articles
recited, was the controlling document: *Mignan* v. *Parry* (186
31 Beav. 211; 31 L. J. Ch. 819; 135 R. R. 408.

Exception.

Where, under a settlement made after marriage, an adult tak
a smaller interest than he would have taken under the articles, t
presumption is that the variance was made purposely, unless t
settlement is expressly made in pursuance of the articles: *Part*
v. *Roberts* (1756), 1 Amb. 315.

Where a letter by a lady's father, stating what her fortune ould be, was followed by articles for the settlement of part only f the property mentioned in the letter, the articles were alone held inding: *Re Badcock* (1880), 17 Ch. D. 361.

Letter followed by articles.

Specific performance of marriage articles can be obtained by ne wife or the children of a marriage against any person who has ontracted to make provision for them, though some other person ho has contracted to make provision for them has made default n doing so: *Perkins* v. *Thornton* (1741), 1 Amb. 502; *Harvey* v. *shley* (1748), 3 Atk. 607, at p. 611; *Crofton* v. *Ormsby* (1806), 2 ch. & Lef. 583, at p. 602; 9 R. R. 107; *Lloyd* v. *Lloyd* (1837), 2 ly. & Cr. 192; 5 L. J. Ch. 191; 45 R. R. 25; *Campbell* v. *Ingilby* 1856), 21 Beav. 507, at p. 567; 26 L. J. Ch. 654; 118 R. R. 145.

Specific performance of marriage articles.

"In *Grey* v. *Kentish* (1749), 1 Atk. 280, Lord Hardwicke, L.C., reported to have said: 'A husband cannot assign in law a ossibility of the wife, nor a possibility of his own, but this Court ill notwithstanding support such an assignment for valuable onsideration . . . .' This passage is cited with approval by Lord yndhurst in *Meek* v. *Kettlewell* (1843), 1 Ph. 342. One way in hich equity supports such an assignment is by treating the transction, though in form an assignment, as containing or importing covenant to do that which is necessary to effect the validity of he assignment: see *per* Cozens-Hardy, M.R., in *Re Mudge*, [1914] Ch. 115, at p. 122; 83 L. J. Ch. 243. And one method by which Court of Equity would compel the performance of such a covenant ould, in a proper case, be by granting a decree for specific erformance": *per* Bankes, L.J., in *Re Lind*, [1915] 2 Ch. 345, t p. 370; 84 L. J. Ch. 884; and see also *Re Dent, ex p. The rustee*, [1922] W. N. 273, both of which last cases are more fully nentioned on p. 562, *supra*.

Specific performance of possibilities under marriage articles and otherwise.

"But notwithstanding these allusions to the doctrine of specific erformance of contracts, it is I think well and long settled that he right of the assignee is a higher right than the right to have pecific performance of a contract": *per* Phillimore, L.J., in *Re ind*, [1915] 2 Ch., at p. 365.

CHAPTER XXXV.

DEEDS TO WHICH FOREIGNERS ARE PARTIES.

Deeds Relating to English Land: Intention of Parties determin Law applicable to Construction of Deeds: Intention declare in Deed : Law generally Applicable is Law of Place where Dee Executed, unless Situation of Property, Form of Deed, Invalidity of Provisions thereof by such Law shows Contra Intention: Law generally Applicable to Marriage Contracts Law of Matrimonial Domicil, unless Situation of Propert Form of Deed, or Invalidity of Provisions thereof by such La shows Contrary Intention : Capacity Determined by Law Domicil.

DEEDS relating to English land, whether freehold or leasehol in English form are construed by English law : *Chamberlain Napier* (1880), 15 Ch. D. 614; 49 L. J. Ch. 628; but questio frequently arise as to the national law by which the constructi of deeds and contracts relating to property other than land, and marriage settlements of personalty, made between parties different nationalities is to be regulated.

The true rule for determining the question, which is applicab to all documents, is—

Law applicable is determined by intention of parties.

> "The intention of the parties to a contract the true criterion by which to determine by wh law it is to be governed": *per* Lord Lindle *Spurrier* v. *La Cloche*, [1902] A. C. 446, at p. 45 71 L. J. P. C. 101.

"In cases where a contract is not immoral, nor contrary public policy, a solution of the question by what law the contra is to be governed is arrived at when it has been ascertained by wh law the contracting parties intended it to be governed. It is op to the parties to stipulate in express terms that the law of particular country shall apply. If they do so, that law is appli able. If there is no express stipulation the Court must arrive a conclusion upon the materials before it as to the law with ref

ce to which the parties contracted, and that law is to be applied. broad rule has been laid down that *prima facie* the *lex loci con-actus* presumably governs the nature, the obligation, and the terpretation of the contract, unless the contrary appears to be e express intention of the parties. But the terms in which is rule is itself stated show that it yields to the intention of the rties": *per* Swinfen Eady, J., in *British South Africa Co.* v. *e Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354, at p. 381; L. J. Ch. 345.

Of course this intention can be shown, and indeed often is shown, a declaration in the document itself as to the law by which it is be construed: *Re Hernando* (1884), 27 Ch. D. 284; 53 L. J. Ch. 5; but where this has not been done, the intention, in the absence any special circumstances, as regards documents other than arriage settlements, is presumed to be that they are to be con-rued by the law of the place where they are made; and as gards marriage settlements that they are to be construed by the w of the intended matrimonial domicil.

Law generally applicable is law of country where deed executed.

"It is, however, generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention": *per* Willes, J., *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, at p. 122; 35 L. J. Q. B. 74; 141 R. R. 352.

Examples.

Thus where a contract was made in London between London rms for the shipment by a French company of Algerian esparto an Algerian port, it was held that the contract was to be con-rued and governed by English law, and that the shippers were ot excused from performing the contract by the existence of *force ajeure* at the French port, though such would have been a good efence according to French law: *Jacobs* v. *Crédit Lyonnais* 884), 12 Q. B. D. 589; 53 L. J. Q. B. 156; see also *Blackburn obbin Co.* v. *Allen*, [1918] 1 K. B. 540; on appeal, [1918] 2 . B. 467; 87 L. J. K. B. 1085; and a charterparty on an ordinary nglish printed form, negotiated and made in London between the ondon broker of a domiciled German and merchants in London r a voyage of the German's ship, was construed by English law: *he Industrie*, [1894] P. 58; 63 L. J. P. C. 84. See also *Benaim &* . v. *Debono*, [1924] A. C. 514; 93 L. J. P. C. 133, where the

law applied was the *lex loci solutionis* in accordance with the inte tion appearing upon the face of the instrument as to performan of the contract.

A contract having been made in the South African Republic b an English company carrying on business in South Africa with a English servant resident in the South African Republic for the pe formance by him of services in South Africa, it was held that th contract, though made in English form, was governed by the law the South African Republic: *South African Breweries, Ltd.* *King*, [1899] 2 Ch. 173; [1900] 1 Ch. 273; 69 L. J. Ch. 171.

Mortgage.

"In my opinion an English contract to give a mortgage foreign land, although the mortgage has to be perfected accordi to the *lex situs*, is a contract to give a mortgage which—*int partes*—is to be treated as an English mortgage and subject to su rights of redemption and such equities as the law of Engla regards as necessarily incident to a mortgage": *per* Cozens-Hard M.R., in *British South Africa Co.* v. *De Beers Consolidated Min* [1910] 2 Ch. 502, at p. 515, followed in *Re Smith*, [1916] 2 C 206; 85 L. J. Ch. 802.

Circumstances showing intention that another law should apply.

The following circumstances have been held to show an intenti that the contract should be governed by a law other than that the place where the contract is made: (i) The fact that t property is situate elsewhere; (ii) the fact that the form of t contract is that of another country; (iii) the fact that certa stipulations in the contract would be void according to the law the country where the contract is made.

Situation of property.

Thus the extent of an authority given by a foreign power attorney intended to be acted upon in England must be determin by English law: *Chatenay* v. *Brazilian Submarine Telegraph C* [1891] 1 Q. B. 79; 60 L. J. Q. B. 295; and for a case of t converse nature, where the power of attorney was to be act upon in British Guiana and the Roman-Dutch law there prevaili applied, see *Stuart* v. *Norton* (1860), 14 Moore P. C. C. 17.

The capacity of a person to contract in regard to land situ in a colony is governed by the *lex situs*, and a power to carry in effect a contract void for want of capacity is, of course, ineffectu *Bank of Africa, Ltd.* v. *Cohen*, [1909] 2 Ch. 129; 78 L. J. Ch. 7

Form of deed.

A fire policy of an English company, made in Jersey chattels in Jersey assuring money to be paid in Jersey out the funds of the company, in the English language and for and containing a reference to the English Arbitration Act, was h to be governed by the law of England, and not by that of Jerse *Spurrier* v. *La Cloche*, [1902] A. C. 446; and a marine policy English form, but executed in Sweden, providing that the part in case of dispute agree to be bound in all things by the jurisdicti

l decision of the English Law Courts, is to be construed by glish law: *Royal Exchange Assurance Corporation* v. *Sjoforsangs Aktiebolaget Vego*, [1902] 2 K. B. 384, at pp. 394—396; 71 J. K. B. 739.

Invalidity of provisions by law of place where deed executed.

The fact that certain stipulations in the deed are valid by the ws of one country only, shows that the law of that country is that which the contract is to be governed. Thus a contract, made in nerica between an American citizen and an English company for rrying cattle from America to England in a British ship, conning a stipulation that the company should not be liable for the gligence of the master or crew of the ship, such stipulation being od by English law but invalid by American law, is governed by glish law: *Re Missouri Steamship Co.* (1888), 42 Ch. D. 321; 58 J. Ch. 721; and see *Jones* v. *Oceanic Steam Navigation Co.*, 924] 2 K. B. 730; 93 L. J. K. B. 1053; and *N. V. Kwik* v. *James nlay & Co.*, [1927] A. C. 604, at p. 609; 96 L. J. K. B. 902.

And where a contract between an English and a Scots firm, ned in England but to be performed in Scotland, contained a pulation for reference of disputes to two unnamed members of e London Corn Exchange (which by Scots law was inoperative, e members not being named), it was held that the contract was verned by English law: *Hamlyn* v. *Talisker Distillery*, [1894] C. 202. See also *Norske Atlas Insurance Co.* v. *London General surance Co.* (1927), 43 T. L. R. 541.

With regard to marriage settlements—

In marriage settlements law generally applicable is that of intended matrimonial domicil.

> "As a general rule the law of the matrimonial domicil is applicable to a contract in consideration of the marriage": *per* Cozens-Hardy, L.J., *Re Fitzgerald*, [1904] 1 Ch. 573, at p. 587; 73 L. J. Ch. 436.

Intention of parties.

"In the absence of any indication of a contrary intention, a arriage settlement is to be construed according to the law of the atrimonial domicil, but . . . the rule yields to the intention of e parties": *per* Eve, J., in *Re Hewitt's Settlement*, [1915] Ch. 228, at p. 232; 84 L. J. Ch. 358.

An ante-nuptial contract in the Scots form executed in Scotland persons domiciled in Scotland, and residing there after their arriage, is construed by Scots law: *Anstruther* v. *Adair* (1834), My. & K. 513; *Williams* v. *Williams* (1841), 3 Beav. 547; and a ttlement in the Scots form executed in England by a husband miciled in Scotland and a wife domiciled in England, who resided ter marriage in Scotland, is construed by Scots law: *Duncan* v. *nnan* (1854), 18 Beav. 128; 109 R. R. 32; on app. (1855), 7

D. M. & G. 78; 24 L. J. Ch. 460; and a settlement in French fo executed in France by persons domiciled in England, but residi in France, and intending to reside there subsequently to the ma riage, was construed by French law: *Este* v. *Smyth* (1854), Beav. 112; 23 L. J. Ch. 705; 104 R. R. 393; and a settlement English form executed in England by a domiciled Turk and domiciled Englishwoman, who intended to reside subsequently the marriage in England, was construed by English law: *Colliss Hector* (1875), L. R. 19 Eq. 334; 44 L. J. Ch. 267.

Circumstances showing intention that another law should apply.

The following circumstances have been held to show that t settlement is to be governed by a law other than that of the mat monial domicil, *viz.*, (i) the fact that the property comprised the settlement is English realty, (ii) the form of the limitations the settlement, (iii) the invalidity of its provisions according to t law of the matrimonial domicil.

Situation of property.

If the settlement is of English land and in English form, it w be construed by English law. Thus, where a settlement was ma in Scotland, by a domiciled Englishman resident in Scotland his marriage with a domiciled Scotswoman, of English real est in English form, it was held that the construction of the deed w to be determined by English law: *Chamberlain* v. *Napier* (1880), Ch. D. 614. See also *Re Mackenzie*, [1911] 1 Ch. 578; 80 L. Ch. 443, where on p. 596 of the first report Swinfen Eady, J., say "As a general rule, the law of the matrimonial domicil is applica to a contract in consideration of marriage, but this is not absolute rule; it yields to the intention of the parties, eit expressed, or to be gathered from all the circumstances of t case."

Form of deed.

A settlement made in the English form, and apparen executed in France, on the marriage of a domiciled Frenchm with a domiciled Englishwoman, who subsequently to the marri resided in France, was construed by English law: *Watts Shrimpton* (1855), 21 Beav. 97; 111 R. R. 34; *Van Grutten Digby* (1862), 31 Beav. 561; 32 L. J. Ch. 179; 135 R. R. 5 *Re Mégret*, [1901] 1 Ch. 547; 70 L. J. Ch. 451.

By a marriage settlement made in England by an infant a sanctioned under the Infants' Settlement Act, 1855, a power appointment over the settlement funds was given to the infant " will or codicil executed in such manner as to be valid accord to the law of her domicil, or by any writing purporting to b will or codicil executed in such manner that the same would valid as such according to the law of England if she were at time of her death domiciled in England."

There was a declaration in the settlement that it should construed and the rights of all parties claiming thereunder sho

all respects be regulated according to the law of England. *Held* ter alia), that the declaration did not restrict the testamentary pacity of the wife to full age according to English law and that will made by her at the age of nineteen and valid by the law of ance was an effective exercise of the power as contemplated by settlement: *Re Lewal's Settlement Trusts*, [1918] 2 Ch. 391; L. J. Ch. 588.

And a contract of marriage in the Scots form made on the rriage of a domiciled Englishman and a Scotswoman was conued by Scots law: *Re Barnard* (1887), 56 L. T. 9; *Re Fitzgerald*, ra, p. 699.

Invalidity of provisions by law of domicil.

A settlement valid according to the law of the ante-nuptial nicil of the wife, but invalid according to the law of her trimonial domicil, is to be construed by the law of her anteptial domicil, at any rate, so far as regards property situate in forum of her ante-nuptial domicil: *Van Grutten* v. *Digby*, ra, p. 700.

So a settlement in English form of English funds made by an glishwoman on her marriage with an Italian (which settlement s void by Italian law), was held to be governed by English law, d a covenant for settlement of after-acquired property contained rein was accordingly held binding on the wife: *Re Bankes*, 902] 2 Ch. 333; 71 L. J. Ch. 708.

Capacity determined by law of domicil.

But the capacity of the parties is regulated by the law of micil: *Guépratte* v. *Young* (1851), 4 De G. & Sm. 217; 87 R. 355.

Thus where by the law of a foreign country the husband and e have the right to revoke their marriage contract, and such ht cannot be waived or lost, an Englishwoman can, with her sband's consent, revoke a post-nuptial settlement made in the glish form in pursuance of ante-nuptial articles to which she, an infant, was a party, and which was consequently voidable by r, because on her marriage she acquires her husband's domicil, d is subject to the law of that domicil, and hence cannot ectually ratify her ante-nuptial contract: *Viditz* v. *O'Hagan*, 900] 2 Ch. 87; 69 L. J. Ch. 507.

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